Supreme Court, U.S.
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91-544

No. - .

In the Supreme Court of the United States

October Term, 1991

CAMPBELL'S MOVING COMPANY, INC.,

Petitioner,

v.

MARTIN L. GOOZMAN,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

Robert J. Gallagher, Esq.
17 New South Street
Northampton, MA 01060
(413) 586-1994
Counsel of Record
for Petitioner

Appeals Printers
Boston, MA

QUESTION PRESENTED FOR REVIEW

1. Pursuant to the Decision of this Court in Maislin Industries, Inc., et al. v. Primary Steel, Inc., 497 U.S. ____ 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990), is a Trustee in Bankruptcy exempt from the requirement set forth in Maislin that all shippers are bound to pay the lawful tariff charges in an action by a motor common carrier subject to the provisions of the Interstate Commerce Act to recover its lawful tariff charges on traffic transported by the Trustee in the process of consolidating the estate?

PARTIES TO THE PROCEEDING BELOW

Appellant in the court below was Campbell's Moving Co. a Pennsylvania Corporation, which was a motor common carrier regulated by the Interstate Commerce Act.

Appellee in the court below was Martin L. Goozman, Trustee in Bankruptcy for the estate of MBI Business Centers, Inc.

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49 U.S.C. Section 10762(a)(1)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CAMPBELL'S MOVING COMPANY, INC.,

Petitioner,

v.

MARTIN L. GOOZMAN,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Campbell's Moving Company, Inc. prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Fourth Circuit entered in this cause on June 28, 1991.

OPINIONS BELOW

The decision of the Court of Appeals was not recommended for full-text publication. It is reproduced as Appendix A hereto.

The District Court decision was not recommended for full text publication. It is reproduced as Appendix B hereto.

The decision of the Bankruptcy Court was not recommended for publication. It is reproduced as Appendix C hereto.

GROUNDS FOR THE COURT'S JURISDICTION

The decision of the Court of Appeals was entered on June 28, 1991. No petitions for rehearing were filed. The jurisdiction of this Court is invoked under Section 1254 (10), Title 28 of the United States Code.

STATUTES INVOLVED

Section 10761(a) of the Interstate Commerce Act, 49 U.S.C. Section 10761 (a) provides:

> Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for

> the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

Section 10762(a) (1) of the Interstate Commerce Act, 49 U.S.C. Section 10762(a) (1) provides:

> A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this

> chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one year may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

Section 503(b) (1) (A) of Title 11 of the United States Code provides:

> After notice and a hearing, there shall be allowed, administrative expenses, other than claims allowed under section 502 (f) of this title [11 USCS Section 502(f)], including-
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or

commissions for services rendered after the commencement of the case;

FEDERAL JURISDICTION

The cause of action arose under Sections 10761 (a) and 10762(a)(1) of Title 49, and Sections 503(b)(1) of Title 11 of the United States Code. Jurisdiction of the United States Court of Appeals for the Fourth Circuit was invoked pursuant to Sections 1291 and 1294(1) of Title 28 of the United States Code.

STATEMENT OF THE CASE

This case raises the same issues of the duty of a carrier to collect and a shipper to pay the filed tariff rate, which this Court addressed in its decision of Maislin Industries, Inc. et al. v. Primary Steel, Inc., 497 U.S. _____, 110 S.Ct. 2759, 111 L.Ed. 2d 94 (1990). This case is however

factually dissimilar from the Maislin case in that, in this case, the shipper of the goods was a Trustee in bankruptcy. Therefore this case raises the question of whether a Trustee, which acknowledged in the proceedings below that it was both the consignor and the consignee of the shipments at issue, is exempt from the ruling of this Court in Maislin.

Petitioner Campbell's Moving Company, Inc. (hereinafter Campbell's) is a motor common carrier of household goods. It provides transportation services to the shipping public under a Certificate of Public Convenience and Necessity issued to it by the Interstate Commerce Commission.

The bankruptcy proceedings which have lead to this dispute, commenced with the voluntary petition under Chapter 11 filed by M.B.I. Business Centers (hereinafter referred to as MBI) on September 18th, 1987. Its wholly owned subsidiary, Prodigy Systems, Inc. filed its Petition under

Chapter 11 on October 13th, 1987. On December 18th, 1987, the court converted the cases to proceedings under Chapter 7. The Trustee was appointed for both cases on December 23rd 1987.

On January 21st, 1987, pursuant to the instructions of an agent of the Trustee in Bankruptcy, Campbell's began picking up the goods of the estate and delivering them to a central warehouse in Chantilly, Virginia. This consolidation had been ordered by the Trustee in bankruptcy to facilitate the management of the goods of the estate and their final sale.

At each of the 21 locations at which Campbell's picked up goods, it's employees were let in by employees of the Trustee, told by those employees what to take, and what not to take, and requested and got the signatures of those employees on the bills of lading it issued governing the movements. The goods moved under household goods bills

of lading which provided that both the consignor and the consignee were liable for the payment of the freight charges.

On delivery to the Chantilly warehouse, employees of the Trustee accepted delivery of the goods from Campbell's.

Campbell's sent the trustee an invoice dated March 3, 1988, for $110,329.26 based on a 25% discount on the tariff rate as calculated by Campbell's. Subsequently, Campbell's sent the trustee another invoice also dated March 3, 1988, for $149,968.41, which did not include the discount. The second sum was sought in Campbell's application for administrative expense.

In his Memorandum of Decision dated August 28th 1989, the Bankruptcy Court found that Campbell's was not entitled to compensation in the amount of the full tariff rate, but was entitled to $100,000.00, representing the actual value of Campbell's services to the estate.

In his Decision, Judge Mannes said:

> Even within the sphere of Title 49, the filed rate doctrine is not absolute; it is subject to the standard of reasonableness provided by 49 U.S.C. Section 10701(a), which states:
>
> Section 10701. Standards for rates, classifications, through routes, rules and practices.
>
> (a) A rate (other than a rail rate) classification, rule, or other practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier (including a rail carrier) must be reasonable. Divisions of joint rates by those carriers (including a rail carrier) must be made without unreasonable discrimination against a participating carrier and must be reasonable.

The Interstate Commerce Commission has announced its policy to review on reference from a court, unreasonable practices or [sic] motor carriers respecting unfiled negotiated tariffs: "We believe, in the highly competitive motor carrier industry and economy in general, equitable defenses to rigid application of filed tariff rates should be available on a case by case basis and that our unreasonable practice jurisdiction authorizes such an approach." National Industrial Transportation League - Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 I.C.C. 2d 99 (1986). The ICC policy has sparked opinion pro [citations omitted]. The relevance of this doctrine is that it convinces the court that the filed rate doctrine is not as unassailable as Campbell's urges. Memorandum of Decision, 12-13.

Bankruptcy court concluded that a reasonable sum for a common carrier to collect for this shipment was $100,000.00, and awarded that sum to Campbell's.

Both parties appealed this decision to the District Court. This court also found that the carrier's filed tariff rate was entitled to no particular deference, and, applying a cap which had been placed in the Trustee's initial request for administrative expense to transport these goods, decided that Campbell's was entitled to $25,000.00, of which it was to get $19,686.00 from P.R. Logistics, an unlicensed transportation broker which had been involved in the transaction.

In its Decision, the District Court acknowledged that the Decision of this Court in Maislin had been cited to it:

> In addition, Campbell's has submitted the United States Supreme Court case of Maislin Industries, U.S.,

Inc. v. Primary Steel, Inc., slip op. no. 89-624 (June 21, 1990) as authority for its position. That case is distinguishable from the present case and is therefore inapplicable.

The Court of Appeals for the Fourth Circuit affirmed this judgement. It did not directly address the Decision of this Court in Maislin, which decision had been extensively brought to that court's attention, but the language of its decision is intrinsically contradictory to the Maislin decision.

A few salient facts are worth reiterating, however. Campbell's never contracted with, nor even spoke to, the bankruptcy trustee directly, nor did Campbell's ever inform the trustee or his employees that Campbell's would demand payment of its tariff rate. Campbell's never sought nor obtained the advance approval of the bankruptcy court.

> Campbell's failed to take the steps necessary to insure payment of its tariff rate. Campbell's is not now entitled to an order compelling the trustee to pay more than eight times the price he agreed to pay for the transportation of the assets of the bankruptcy estate. (Page 9) (emphasis supplied)

REASONS WHY THIS WRIT SHOULD BE GRANTED

A. The Ruling Below Conflicts with Decisions of this Court

The decision of this Court in Maislin is one of a long line of decisions from this Court which have held that a shipper is bound by law to pay the filed tariff rate of the common carrier which transported its goods. See e.g. Keogh v. Chicago & Northwestern R.Co., 260 U.S. 156, 163, 43 S.Ct. 47, 49, 67 L.Ed. 183; Texas & Pacific R.Co., v. Mugg, 202 U.S. 242, 245, 26 S.Ct. 628, 630, 50 L.Ed. 1011;

Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97, 35 S.Ct. 494, 495, 59 L.Ed. 853; Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533, 535, 103 S.Ct. 1343, 1344, 75 L.Ed 2d 260.

This Court has consistently held that neither mistake nor fraud nor ignorance of the filed tariff rate can change this duty, but the Court of Appeals for the Fourth Circuit has found that a Trustee in bankruptcy, an officer of the court, presumptively better aware of the requirements of the United States Code than is the average shipper, is exempt.

Such an exemption is not contained in either the Bankruptcy Code of the United States, Title 11 of the United States Code, nor is it set forth in Title 49 of the United States Code, governing transportation.

In its treatment of the case, the District Court explained its divergence from the filed rate doctrine as a result of the fact that the Trustee was

acting for an estate in bankruptcy and bankruptcy changes things. This is true but irrelevant. The cases cited in support of the proposition that a Trustee in bankruptcy need not pay a carrier's filed rate, were alike in one regard, they all concerned a situation in which the transportation charges were incurred pre-petition and the Trustee was permitted to pay a fractional share of those charges, proportionate to that received by other, unsecured creditors. e.g. In re Roll Form Products, Inc., 662 F.2d 150 (2d Cir. 1981); In re Penn-Dixie Steel Corp., 6 B.R. 817 (B.C. S.D.N.Y. 1980), aff'd 10 B.R. 878 (S.D.N.Y. 1981) That is not the situation here. In this case, the estate itself incurred these expenses post-petition as an administrative expense. Therefore, the Trustee cannot use the truism that "bankruptcy changes things" because there has been no intervening bankruptcy between the time the shipper and carrier entered into this contract

and the present time. The Trustee has been unable to find one citation which would support its premise that, despite the absence of such exempting language in either the Transportation or the Bankruptcy statutes, it is exempt from the universal provisions of the filed rate doctrine.

B. Allowing the Decision of the Court Below to Stand Would Create a Conflict between the Rule Adopted in the Fourth Circuit and the Decisions of other Courts of Appeal after the Decision of this Court in Maislin

Subsequent to the Decision of this Court in Maislin, one Court of Appeals has directly addressed the issue of whether equitable considerations can estop a common carrier in interstate commerce from collecting its filed tariff rate. In Orr v. Interstate Commerce Commission, 912 F. 2d 119, 121-2, the Court of Appeals for the Sixth Circuit followed this Court in

finding that the filed rate doctrine was binding on shippers and could not be waived. Therefore, allowing the Fourth Circuit to create an exception to the doctrine, to which this Court and the Sixth Circuit have seen none, will create a conflict between the Circuits.

C. Allowing the Decision of the Court Below to Stand Would Create an Unnecessary Conflict between Federal Statutes

As this Court has set forth in the Maislin Decision, the collection of a carrier's filed tariff rate is not an issue which can be tempered by equitable considerations, it is a matter of applying the law as Congress created it. The decision of the Fourth Circuit would imply an exception clause into the statute which does not exist in either of the Titles in which Congress might have chosen to include it. Under the Fourth Circuit's

interpretation of the Statutes, a Trustee is to have wide discretion not to abide by federal law when those laws would hinder him in the administration of the estate.

This conflict does not need to exist. A reading that would allow the two statutes to be harmonized would require that the Trustee pay the value to the estate of the services rendered and that when those services are rendered by an entity required by law to charge a certain rate, that rate is the measure of the value of the services to the estate.

To find otherwise would vitiate the purpose of giving priority of payment to administrative expenses. In effect, the tariff rate is the contract price, which the shipper is presumed, by law to know. See for example, Louisville & Nashville R. Co. v. Maxwell, supra, in which the person held to liable to pay the filed tariff rate was an ordinary train passenger, although this would have been a logical

time for the Court to have relaxed the requirements of the filed rate doctrine, in that case and in all the other cases that this Court has decided on the issue, it has come to the conclusion that no such relaxation is possible.

What vender or provider of services would be willing to give value to a Trustee in bankruptcy, if it were known that, after the services have been completed, the Trustee could tot up the balances and decide that the decision to utilize those goods and services did not benefit the estate and therefore the Trustee is not bound to pay the agreed upon price for them? If that were true, merchants and providers of services would become concerned about the uncertainty of working for a Trustee, and Trustees would be unable to procure the goods and services they need to administer estates. That cannot be, and is not the law. Where a Trustee enters into a contract for the provision of goods and services, it is

bound by the terms of that contract. Under the filed rate doctrine, the Trustee has no protection in the defense that he was unaware of the terms of that contract, the law presumes him to have known.

CONCLUSION

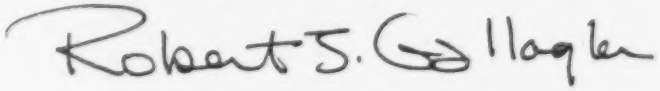
This Court has already announced its support for the filed rate doctrine. However, the exception carved into that doctrine by the Fourth Circuit now makes it necessary for this Court to return to that matter. It is for this Court to determine whether the Courts of Appeal have it within their power to make an exception to a rule long a part of the law of this country, to which this Court did not feel free to make exceptions.

The powers delegated to the bankruptcy courts by Congress are broad, and there is a tendency in the district courts, when confronted with a

ruling by a bankruptcy court to accept them on the grounds that "bankruptcy changes things." But no statute, regulation or case can be cited to justify ignoring the specific holding of this Court in Maislin. Such a rejection should not be tolerated.

Petitioner therefore requests this Court to grant this writ for certiorari and that same be issued to the United States Court of Appeals for the Fourth Circuit to the end that its decision be reversed and held null, and that the Trustee be commanded and held liable to pay the full filed rate of the motor common carrier.

Respectfully submitted,



s/Robert J. Gallagher
17 New South Street
Northampton, MA 01060
Counsel of Record
for Petitioner

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APPENDIX

Robert J. Gallagher, Esq.
17 New South Street
Northampton, MA 01060
(413) 586-1994
Counsel of Record
for Petitioner

Appeals Printers
Boston, MA

APPENDICES A1

APPENDIX A. A1

APPENDIX B. A17

APPENDIX C. A41

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-3119

In Re: MBI BUSINESS CENTERS, INCORPORATED, t/a The Math Box, t/a Micro South Corporation, d/b/a/ Computer South, t/a Micro Source Financial, Incorporated; In Re: PRODIGY SYSTEMS, INCORPORATED,

Debtors.

CAMPBELL'S MOVING COMPANY, INCORPORATED,

Appellant,

versus

MARTIN L. GOOZMAN,

Trustee - Appellee.

No. 90-3137

In Re: MBI BUSINESS CENTERS, INCORPORATED, t/a The Math Box, t/a Micro South Corporation, d/b/a/ Computer South, t/a Micro Source Financial, Incorporated; In Re: PRODIGY SYSTEMS, INCORPORATED,

Debtors.

MARTIN L. GOOZMAN,

Trustee - Appellant,

Versus

CAMPBELL'S MOVING COMPANY, INCORPORATED,

Appellee.

Appeals from the United States District Court for the District of Maryland, at Baltimore. Joseph C. Howard, District Judge. (CA-89-3147-JH)

Argued : February 4, 1991
Decided: June 28, 1991

Before WIDENER and MURNAGHAN, Circuit Judges, and McMILLAN, Senior United States District Judge for the Western District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion. Judge Widener wrote a concurring opinion.

ARGUED: Robert Joseph Gallagher, Northhampton, Massachusetts, for Appellant. Bud Stephen Tayman, Laurel, Maryland, for Appellee. **ON BRIEF:** Gregory M. Wilson, Laurel, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

I.

The facts of this case, as found by the bankruptcy court and accepted by the district court, are as follows: M.B.I. Business Centers, Inc. ("MBI") was a retailer of consumer computer equipment with 25 retail stores at various locations in the Eastern states. On September 18, 1987, it filed a voluntary petition under chapter 11 of the bankruptcy code. The cases were converted to chapter 7 on December 18, 1987, and defendant Martin Goozman was appointed trustee.

After his appointment as trustee, Goozman hired several of MBI's former employees to assist with the liquidation of MBI's remaining assets. Two of those former employees, Robert Katchmar and his assistant Christine Taylor, were hired to run MBI's main

warehouse in Chantilly, Virginia. Their employment was authorized by the bankruptcy court on December 30, 1987.

The conversion to chapter 7 presented the trustee with the question of how to liquidate the remaining assets in order to render the greatest return for the creditors. There were two options: to have a sale or auction at each of the individual locations, or to have one large sale or auction at the main warehouse in Chantilly.

Katchmar was approached by Ralph Kresge, president of a company named PR Logistics, who offered the moving services of his company to help with the liquidation. To prepare an estimate for the cost of the move, Kresge reviewed the inventory lists for the stores.*[1] He made a proposal based

---

1. "Katchmar and Taylor urged Kresge to go to some of the locations, at least those in the area, to see what was actually there, because they believed the inventory lists were not reliable. He declined to do this and made his estimate based upon the lists.

upon an estimate 2,000 pounds per store. Relying on household goods tariffs, Ralph Kresge's brother, Paul Kresge, arrived at a cost to move the inventory of $39.25 per 100 pounds. On December 29, 1987, Ralph Kresge submitted an offer to the trustee to move the goods for $785.00 per store for a grand total of $19,625. No mention was made of the $39.25 per 100 pound calculation.

A cap for the cost of the move was set at $20,000; that cap was later revised to $25,000 at the request of the secured creditors. The proposal was forwarded to Ralph Kresge and he signed it on January 14, 1988. The contract was accompanied by a declaration which stated that PR Logistics was a duly bonded mover. The declaration was signed by Ralph Kresge on January 10, 1988. On January 14, 1988, the court authorized the employment of PR Logistics.

At the time that Ralph Kresge signed the declaration, PR Logistics was not licensed as a broker for transportation nor holder of a certificate or permit as a motor carrier as required by 49 U.S.C. s.10921. Nonetheless, PR Logistics brokered the move. Paul Kresge called Richard Dameron of Denver Moving and Storage Company, Inc. ("Denver Moving") regarding the project, but Dameron declined to handle the move. However, on January 13, 1988, Dameron called Joseph Campbell of plaintiff Campbell's Moving Company, Inc. ("Campbell's"). Dameron and Campbell had a longstanding reciprocal relationship as United Van Lines agents. Campbell initially agreed to do the move for $600 per store based upon the (inaccurately) estimated amount of materials that had to be moved.

Campbell knew within a day or so of January 13, 1988, that the moves were being done for a bankruptcy

trustee. Furthermore, Campbell's conclusion that he was hired by the bankruptcy trustee was a result of a phone conversation in which Kresge represented himself as a representative of the trustee. Dameron, however, understood that PR Logistics was to pay Campbell's because he and Campbell had made the arrangements with PR Logistics. Mr. Campbell does not consider that his company was hired by PR Logistics or by Denver Moving. In any event, Campbell's was not directly hired by the trustee.

As the move commenced, it became obvious that the initial cost estimate was far lower than the actual cost of the move. Upon learning this fact, Campbell called Dameron demanding payment per his tariff rate. Dameron relayed this message to Kresge, who assented to the demand. Thereafter, Dameron was no longer involved.

Ralph Kresge was concerned that the amount of material to be shipped exceeded his estimate of 2,000 pounds

per store. He therefore contacted and subsequently met with the trustee, Katchmar and Wendelin Lipp, one of the trustee's attorneys, to discuss what actually had to be moved. During this meeting, Kresge assured the trustee and his employees that the cost of the move would not exceed the $25,000 cap, at least not without prior notification. At that time, the trustee was unaware of the $39.25 per 100 pound weight calculation and, furthermore, he was unaware that PR Logistics was not physically doing the move but had instead brokered the operation.

Meanwhile, Campbell's continued to move the assets. By February 11, 1988, Campbell's had incurred $100,000 worth of moving expenses and Campbell began to worry about payment. He called the trustee's office and spoke with Wendelin Lipp, seeking assurance of payment. Lipp told Campbell that the trustee had not hired Campbell's; that the estate would not pay Campbell's; and that Campbell's should seek payment

from PR Logistics. She also warned Campbell against seizing the assets in order to ensure payment.

Lipp then called Ralph Kresge of PR Logistics, who assured her that Campbell's was "his problem" and that the cost of the move would not exceed the $25,000 upon which they had originally agreed. Campbell's continued the move and subsequently billed the trustee's office.

The move was massive. Over 300,000 pounds of materials were moved. The trustee sold the goods which were transported to the warehouse and those that were already there for $2,850,000. Following the move, Campbell's sent an invoice to the trustee dated March 3, 1988, for $110,329.26. That price was based upon a discount of 25% off the tariff rate. Later, Campbell's sent another invoice, also dated March 3, 1988, for $149,968.41 for an administrative expense. That price did not include the 25% discount. Subsequently, Campbell's amended its

application and now asks for $208,378.50. This figure includes interest and expenses incurred during the pendency of the bankruptcy proceedings.

II.

The bankruptcy court held that Campbell's was entitled to payment for the value of its services to the bankruptcy estate, which the court placed at $100,000. The bankruptcy court declined to award interest, stating that interest on administrative expenses "is available in only the most unusual circumstances, which are not present here. "

The district court reversed the bankruptcy court in part, and held that Campbell's was entitled to only $25,000 as an administrative expense.

The district court first held that Title 11, not Title 49 (which prohibits carriers from charging less than their

filed rates) was controlling, reasoning that "[i]f a carrier were permitted to enforce its tariff against a debtor, the priority of equality of distribution to creditors would be frustrated."

The court further held that the carrier was not a "professional person" whose employment required approval of the bankruptcy court.

The court stated that in order to qualify as an administrative expense, the expense must: 1) be actual and necessary; and 2) have benefited the estate and not have been incurred primarily in the interest of the claimant.

The court held:

> The move, if it had cost $25,000, would have been beneficial to the estate. However, a move which cost in excess of $100,000 could only be considered detrimental and an expense which was incurred primarily in the interest of the claimant. Patch Graphics, 58 B.R. at 745 [Bkrtcy. W. D. Wis. 1986]. Accordingly, the $100,000 moving expenses do not

qualify as an administrative [expense] under section 503(b)(a)....

...Katchmar and the other MBI employees were agents of the trustee. However, it is significant that the bills of lading were not filled out when signed. Katchmar and the other employees believed that the move would cost a flat fee of $25,000. The fact that the bills of lading were blank substantiated that understanding. Moreover, although Katchmar knew that Campbell's was working with PR Logistics on the move, he was never informed that Campbell's was working under a different agreement than the one originally signed with PR Logistics.

Campbell's services were authorized through agency principles. Indeed, the work Campbell's performed benefited the estate in the same way that PR Logistics' services would have benefited the estate. Therefore, the only solution to this dispute is that the estate should compensate Campbell's for the work performed pursuant to the terms of the agreement signed by PR Logistics. Campbell's is hereby granted

> the sum of $25,000 for services performed as an administrative expense....
>
> ...The terms of that agreement governed the operation of the move from the outset, and cannot be changed in the interim based upon unauthorized acts committed by Ralph Kresge and PR Logistics."

District Court Opinion at 8-12 (footnotes omitted).

III.

We agree with the reasoning and conclusions set forth in the opinion of the district court, and do not believe it necessary to repeat them here.

A few salient facts are worth reiterating, however. Campbell's never contracted with, nor even spoke to, the bankruptcy trustee directly, nor did Campbell's ever inform the trustee or his employees that Campbell's would demand payment of its tariff rate.

Furthermore, Campbell's never sought nor obtained the advance approval of the bankruptcy court.

Campbell's failed to take the steps necessary to insure payment of its tariff rate. Campbell's is not now entitled to an order compelling the trustee to pay more than eight times the price he agreed to pay for the transportation of the assets of the bankruptcy estate.

The decision of the district court is hereby

AFFIRMED.

WIDENER, Circuit Judge, concurs in the result.

APPENDIX B

IN THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No.:JH 89-3147

MARTIN L. GOOZMAN, Trustee
appellant,

v.

CAMPBELL'S MOVING CO., INC.
appellee

OPINION

This appeal and cross-appeal arise from an order entered by the bankruptcy court on August 28, 1989 denying moving service expenses to PR Logistics and allowing an administrative expense of $100,000 to Campbell's Moving Company. The trustee appeals the $100,000 award to Campbell's. Campbell's brings its cross-appeal to recover the total amount requested in its original invoice of $149,968.79.

Appellate jurisdiction is proper in this case pursuant to 28 U.S.C. s.158(a). This court will affirm the

findings of fact of the bankruptcy judge unless clearly erroneous, giving due regard to the opportunity of the bankruptcy court to judge the credibility of the witnesses. F.R. Bankr. P. 8013; Lubrizol Enterprises v. Richmond Metal Finishers, 756 F.2d 1043 (4th Cir. 1985). A bankruptcy court's conclusions of law are subject to a de novo review by this court. Caswell v. Lane, 757 F.2d 609 (4th Cir. 1985). No hearing is required to dispose of the issues presented. Local Rule 105.6.

I. STATEMENT OF THE FACTS

The court accepts the statement of facts as found by Judge Nannes of the Bankruptcy Court.[1] M.B.I Business Centers, Inc. ("MBI") was a retailer of consumer computer equipment with 25

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1. Although the record on appeal did not contain a copy of the Memorandum of Decision nor the transcript of the proceedings, this court requested a copy of those documents from the appellant and has reviewed them.

retail stores at various locations in the Eastern states. On September 18, 1987 it filed a voluntary petition under chapter 11 of the bankruptcy code. Prodigy Systems, Inc., a wholly owned subsidiary of MBI, also filed a voluntary petition under chapter 11 on October 13, 1987. The cases were converted to chapter 7 on December 18, 1987 and Martin Goozman was appointed trustee.

After his appointment, the trustee hired several of MBI's former employees to assist with the liquidation of the remaining assets. Robert Katchmar and his assistant Christine Taylor were hired to run BMI's main warehouse in Chantilly, Virginia. Their employment was authorized on December 30, 1987.

The conversion to chapter 7 presented the trustee with the question of how to liquidate the remaining assets in order to render the greatest return for the creditors. There were two options: to have a sale or auction

at each of the individual locations, or to have one large sale or auction at the main warehouse in Chantilly.

Katchmar was approached by Ralph Kresge, president of PR Logistics, who offered the moving services of his company to help with the liquidation. To prepare an estimate for the move, Kresge reviewed the inventory lists for the various stores.[2] He made a proposal based upon an estimate of 2,000 pounds per store. Relying on household goods tariffs, Ralph Kresge's brother, Paul Kresge, arrived at a cost to move the inventory of $39.25 per 100 pounds. On December 29, 1987, Ralph Kresge submitted an offer to the trustee to move the goods for $785.00

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2. Katchmar and Taylor urged Kresge to go to some of the locations, at least those in the area, to see what was actually there because the inventory lists were not reliable. He declined to do this and made his estimate based upon the lists.

per store for a grand total of $19,625. No mention was made of the $39.25 per 100 pound calculation.

A cap was set at $20,000 which was later revised to $25,000 at the request of the secured creditors. The proposal was forwarded to Ralph Kresge and he signed it on January 14, 1988. The contract was accompanied by a declaration which stated that PR Logistics was a duly bonded mover. The declaration was signed by Ralph Kresge on January 10, 1988. On January 14, 1988 the court authorized the employment of PR Logistics.

At the time that Ralph Kresge signed the declaration, PR Logistics was neither licensed as a broker for transportation nor issued a certificate or permit as a motor carrier as required by 49 U.S.C. s.10921. Nonetheless, PR Logistics brokered the move. Paul Kresge called Richard Dameron of Denver Moving and Storage Company, Inc. ("Denver Moving") regarding the project but Dameron

declined the offer. However, on January 13, 1988 Dameron called Joseph Campbell of Campbell's Moving Company, Inc. ("Campbell's"). Dameron and Campbell had a longstanding reciprocal relationship as United Van Lines agents. Campbell initially agreed to do the move for $600 per store based upon the estimated amount of materials that had to be moved.

Campbell knew that the moves were being done for a bankruptcy trustee within a day or so of January 13, 1988. (T3 P60 L4-22). Further, Campbell concluded that he was hired by the bankruptcy trustee as a result of a phone conversation when Kresge represented himself as a representative of the trustee. (T3 P47 L6 - P48 L22). Dameron, however, understood that PR Logistics was to pay Campbell's because he and Campbell had made the arrangements with PR Logistics. (T3 P118 L20 - P120 L6). Mr. Campbell does not consider that his company was hired

by PR Logistics or Denver Moving. In any event, Campbell's was not hired by the trustee (T3 P202 L16-18).

As the move commenced, it became obvious that the initial cost estimate was far less than what was actually true. Upon learning this, Campbell called Dameron demanding payment per his tariff. Dameron relayed this message to Kresge, who assented to the demand. Thereafter, Dameron was no longer involved.

Ralph Kresge was concerned that the amount of material to be shipped exceeded his estimate of 2,000 pounds per store. He therefore contacted and subsequently met with the trustee, Katchmar and Wendelin Lipp, one of the trustee's attorneys, to discuss what actually had to be moved. During this meeting, Kresge assured the trustee and his employees that the cost of the move would not exceed the $25,000 cap: certainly not without prior notification. At that time, the trustee was unaware of the $39.25 per

100 pound weight calculation and furthermore, he was completely unaware that PR Logistics was not physically doing the move but had brokered the operation.

Meanwhile, Campbell's continued to move the assets. By February 11, 1988 Campbell's had incurred $100,000 worth of moving expenses and Campbell began to worry about payment. He called the trustee's office and spoke with Wendelin Lipp, seeking assurance of payment. Lipp told Campbell that the trustee did not hire Campbell's, that the estate would not pay Campbell's, and that Campbell's should seek payment from PR Logistics. Lipp then called Ralph Kresge who assured her that Campbell's was "his problem " and also that the cost of the move would not exceed the $25,000 as they had originally agreed. Campbell's continued the move and subsequently billed the trustee's office.

The move was massive. Over 300,000 pounds of materials were moved. The trustee sold the goods which were transported to the warehouse, and those that were already there for $2,850,000. Following the move, Campbell's sent an invoice to the trustee dated March 3, 1988 for $110,329.26 based upon a discount of 25% off the tariff rate. Subsequently, Campbell's sent another invoice, also dated March 3, 1988 for $149,968.41 for an administrative expense which does not include the 25% discount. Subsequently, Campbell's amended its application and now asks for $208,378.50. This figure includes interest and expenses incurred during the pendency of the bankruptcy proceedings.

II. ANALYSIS

A

This matter was properly before the bankruptcy court under Title 11 as determined by that court. Further, this

court agrees with the bankruptcy court's holding that Title 11, not Title 49, controls this action. It is well established that bankruptcy fundamentally alters relationships. See, Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343 (1985). If a carrier were permitted to enforce its tariff against a debtor, the priority of equality of distribution to creditors would be frustrated. See, In re Roll Form Products, Inc., 662 F.2d 150 (2d Cir. 1981); In re Penn-Dixie Steel Corp., 6 B.R. 817 (B.C. S.D.N.Y. 1980), aff'd 10 B.R. 878 (S.D.N.Y. 1981).

Section 327(a) of the bankruptcy code requires court approval before hiring professional persons. That section provides in part:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent

> an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

Although the Bankruptcy Code does not define the term "professional person, " numerous courts have. The court in In re Johns-Manville Corp., found that the phrase "professional persons " "is a term of art reserved for those persons who play an intimate role in the reorganization of a debtor's estate." 60 B.R. 612, 619 (Bkrtcy. S.D.N.Y. 1986). In the often cited case of In re Seatrain Lines, Inc., 13 B.R. 980, 981 (Bankr. S.D.N.Y. 1981), the court held "[f]or the purposes of section 327(a), 'professional person' is limited to persons in those occupations which play a central role in the administration of the debtor proceeding." In In re Fretheim, the court held that a qualitative analysis must be used to determine whether the employed person

falls into the category of professional persons. In particular, the court should consider whether the employee was given a great deal of discretion or autonomy. In re Fretheim, 102 B.R. 298, 299 (Bkrtcy. D.Conn. 1989).

Campbell's was not given any discretion or autonomy in this case. Each move was directed by Katchmar. Furthermore, the employees located at each store instructed the movers as to which items needed to be moved. Campbell's did not exercise its own authority nor did it make any decisions in connection with the move. The court agrees with Judge Wannes's opinion that "neither party acted professionally in any sense of the word, either as a term of art or otherwise." Memorandum of Decision at 16. Therefore, Campbell's was not employed as a professional person requiring prior court approval under section 327(a).

B

Secondly, the trustee asks the court to find that the amount due Campbell's is an administrative expense and therefore requires notice and a hearing under 503(b)(1). 11 U. S .C. s.503 (b)(1)(A) states in part:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including -
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or conmissions for services rendered after the commencement of the case.

There are two determinative factors for an administrative expense. First, the expense must be actual and necessary. Second, the expense must not be incurred primarily in the interest of the claimant and must have benefitted the bankruptcy estate. In re Patch Graphics, 58 B. R. 743, 745

(Bkrtcy. W.D. Wis. 1986). The court in Patch Graphics stated that very large expenditure items are invariably treated as an administrative expense. "However, the tenor of the cases suggest that items supplied to the estate must be essential for the preservation of the estate." Id. at 745.

Campbell's argues that the services performed were actual and necessary. Further, it argues that the services benefitted the estate. (Appellee's brief at 17-18.) This court is unconvinced that a moving expenditure totalling nearly 20% of the total amount of money collected is beneficial to the estate. The trustee had made an agreement with PR Logistics to move the assets of the estate based upon the cost estimate of $25,000. The move, if it had cost $25,000, would have been beneficial to the estate. However, a move which cost in excess of $100,000 could only be considered detrimental and an expense which was

incurred primarily in the interest of the claimant. Patch Graphics, 58 B.R. at 745. Accordingly, the $100,000 moving expenses do not qualify as an administrative under section 503(b)(a).[3]

C

The record in the bankruptcy court includes bills of lading which were signed by representatives of the trustee at both ends of the move. The former BMI employees opened each store for the mover, instructed the mover as to what they were to pack and move, and signed the bill of lading. The bills of lading were signed at all but seven locations. (T3 P14 L1-5). The bills had Campbell's name at the top. Significantly, however, the bills of

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3. As further discussed below, Campbell's is entitled to $25,000 as an administrative expense.

lading did not indicate the charges incurred by the move nor the tariff rate.

If the employees were acting as agents of the trustee at the time that the bills of lading were signed, the trustee is bound by those actions with respect to Campbell's. Therefore, the court must consider whether Katchmar and the other employees were agents of the trustee.

An agent's authority comes from the principal. Progressive Casualty Insurance v. Ehrhardt, 518 A.2d 151, 155 (Md. App. 1986). The agency relationship results when "a person authorizes another to act on his behalf subject to his control and the other consents to do so." Smith v. Jenkins, 452 A.2d 333, 335 (D.C.App. 1982). Further, where an agent is unauthorized to act, but the principal with knowledge of the act acquires and permits the agent to do similar acts, the past unauthorized act is ratified.

Lewis v. Washington Metropolitan Area Transit Authority, 463 A. 2d 666, 671 (D.C. App. 1983).

In addition authority may either be actual or apparent. Id. The apparent authority doctrine has been summarized as "one who knowingly permits another to act for him as though authorized, inducing third persons to rely to their disadvantage on the seeming authority, is estopped from later asserting the lack of authority of his apparent agent. Progressive Casualty, 518 A.2d at 155 (citations omitted).

In this case, Goozman hired Katchmar and other former BMI employees to work for the bankruptcy estate. Katchmar, in his capacity as an agent of the trustee, coordinated the moving process associated with the liquidation. Katchmar was aware from the beginning that Campbell's was moving BMI's products and that PR Logistics was not. (T2 P64 L8-17). Katchmar orchestrated the move and

permitted the bills of lading to be signed by the employees of the estate. Katchmar and the other employees were acting under the control of the trustee, for the benefit of the trustee and the estate, and had the power to alter legal relations of the trustee, thereby satisfying the agency test. Proctor v. Holden, 540 A. 2d 133, 142, 75 Md. App. 1 (1988) (citations omitted).

The court holds that Katchmar and the other BMI employees were agents of the trustee. However, it is significant that the bills of lading were not filled out when signed. Katchmar and the other employees believed that the move would cost a flat fee of $25,000. The fact that the bills of lading were blank substantiated that understanding. Moreover, although Katchmar knew that Campbell's was working with PR Logistics on the move, he was never informed that Campbell's was working

under a different agreement than the one originally signed with PR Logistics.

Campbell's services were authorized through agency principles. Indeed, the work Campbell's performed benefitted the estate in the same way that PR Logistics' services would have benefitted the estate. Therefore, the only solution to this dispute is that the estate should compensate Campbell's for the work performed pursuant to the terms of the agreement signed by PR Logistics. Campbell's is hereby granted the sum of $25,000 for services performed as an administrative expense.[4]

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4. The record is unclear as to whether PR Logistics has received compensation in the amount of $19,686.00. If they have received that sum, Campbell's should recover those funds from PR Logistics and $5,314.00 from the bankruptcy estate.

Because Campbell's moving services in the amount of $25,000 were actual and necessary, and beneficial to the estate, and because a hearing was held to authorize a $25,000 administrative expense, Campbell's is allowed $25,000.

D

In Campbell's cross-appeal, it argues that it should be paid per its tariff, plus interest and costs during the pendency of the litigation. The amount Campbell's requests is $208,378.50. However, Campbell's did not supply any evidence to show that Campbell's participated with the tariffs.[5] In addition, Campbell's has submitted the United States Supreme Court case of Maislin Industries, U.S., Inc. v. Primary Steel, Inc., slip op. no 89-624 (June 21, 1990) as authority for its position. That case is distinguishable from the present case and is therefore inapplicable.

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5. Campbell's motion to supplement the record with Tariff No. 101-C, ICC HGB 101-C is denied pursuant to Fed. R. Civ. P. 52(b).

III. CONCLUSION

The bankruptcy court's decision to award Campbell's request for moving expenses is affirmed in part and amended in part. Campbell's shall be awarded $25,000 pursuant to the terms of the contract signed by PR Logistics. The terms of that agreement governed the operation of the move from the outset, and cannot be changed in the interim based upon unauthorized acts committed by Ralph Kresge and PR Logistics. The court' s decision on the trustee's appeal disposes of the issues raised in the cross-appeal.

A separate order will be entered in accordance with this opinion.

Dated: July 7, 1990.

s/Joseph C. Howard
United States District
Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No.: JH 89-3147

MARTIN L. GOOZMAN, Trustee
appellant,
v.
CAMPBELL'S MOVING CO., INC.
appellee.

ORDER

For the reasons stated in the foregoing opinion it is this _____ [upper right of document imprinted with clerk's stamp dated July 11, 1990] day of July, 1990, by the United States District Court for the District of Maryland, ORDERED

1) That the decision of the bankruptcy court dated August 26, 1989 BE, and the same hereby IS, AFFIRMED in part and AMENDED in part;

2) That Campbell's is entitled to payment in accordance with the foregoing opinion;

3) That the appellee's motion to file its reply brief BE, and the same hereby IS, GRANTED;

4) That Campbell's motion to amend the appellate record BE, and the same hereby IS, DENIED;

5) That the Clerk of Court CLOSE this case; and

6) That the Clerk of Court mail copies of this order and the foregoing opinion to all counsel.

s/Joseph C. Howard
United States District
Court Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
AT ROCKVILLE

IN RE:
M.B.I. BUSINESS CENTERS, INC.:
Debtor
Case No. 87-4-2630-PM
Chapter 7 Debtor

PRODIGY SYSTEMS,INC.
Debtor
Case No. 87-4-2842-PM
Chapter 7

MEMORANDUM OF DECISION
(Applications for Administrative Expense)

Before the court are applications for administrative expense filed by Campbell's Moving Company, Inc. ("Campbell's") and PR Logistics, Ltd. ("PR Logistics"). Both applications relate to moving expenses incurred in consolidating debtor's assets located at its stores to a warehouse in Chantilly, Virginia. The trustee, Martin L. Goozman, opposes both applications. For the reasons contained herein, the court will allow compensation to Campbell's and deny compensation to PR Logistics.

FACTS

This case was commenced by a voluntary petition under Chapter 11 filed by M.B.I. Business Centers, Inc. ("MBI") on September 18, 1987. Debtor was a retailer of consumer computer equipment which it sold at numerous stores from Boston to Atlanta. Prodigy Systems, Inc., a wholly owned subsidiary of MBI, filed its petition on October 13, 1987. On December 18, 1987, the court converted the cases to cases under Chapter 7. The trustee was appointed in both cases on December 23, 1987.

At the time of the conversion, debtor had been operating 22 retail stores as well as three stores located on General Services Administration premises. The stores on government property were known as office technology plus (OTP) centers. Two of the retail stores, at Waltham, Massachusetts, and Edison, New Jersey,

also served as distribution centers, and the contents of closed stores had been collected there.

After his appointment, the trustee, moved swiftly to hire debtor's former employees to assist in liquidating the remaining assets. Among those were Robert Katchmar and his assistant, Christine Taylor, who ran the Chantilly warehouse and controlled the inventory stored there. The court authorized their employment on December 30, 1987.

Shortly before the conversion, IBM engaged PR Logistics to establish a bonded warehouse at Chantilly to control its collateral supplied to MBI. The conversion of the case rendered this operation pointless. Ralph Kresge, president of PR Logistics, thereupon approached Robert Katchmar to offer his company's services in liquidating debtor's assets.

In order to formulate a proposal to the trustee, Ralph Kresge reviewed debtor's inventory lists, such as they

were, with Katchmar and Taylor. Katchmar and Taylor knew that only the inventory list for the Chantilly warehouse was accurate and that inventory lists for the 25 retail locations were dubious at best. They told Kresge that the inventory lists could not be relied upon. Nonetheless, Kresge concluded that the 25 retail centers contained an average of 2,000 pounds of inventory. Kresge clung to this conclusion, despite the trustee's subsequent invitation to visit nearby stores to determine their actual contents. Kresge declined the offer. Ralph Kresge had his brother, Paul, price the proposal based on the 2,000 pound per store figure. Relying on household goods tariffs, Paul Kresge arrived at a cost to move the inventory of $39.25 per 100 pounds, or $785 per ton.

Ralph Kresge presented the trustee, with a handwritten and a typed proposals, both dated December 29, 1987. The proposals were the same

except the typed proposal contained a breakdown of costs for the services proposed. The proposal offered to move product from the 25 centers to the Chantilly warehouse for $785 per center or $19,625 total. Additionally, PR Logistics offered to coordinate the liquidation of debtor's assets.

The trustee was only interested in PR Logistics' offer to move the inventory inasmuch as he had already hired debtor's former employees to coordinate the liquidation. Since the conversion of the case, the trustee in concert with the secured creditors had pondered whether it would be wiser to liquidate the inventory piecemeal from each retail location or to consolidate the inventory and dispose of it through a single sale. The PR Logistics' proposal made the latter course feasible and more attractive than piecemeal liquidation. Had the trustee known the true cost of the move, he would not have consolidated the assets.

All agreed that PR Logistics was to move the inventory, demonstration computer equipment, and office equipment at the 22 stores. The fixtures and furniture were not to be moved since this consisted for the most part of particleboard furnishings used to display the inventory and was largely without value. These furnishings would only be of value to potential purchasers of IBM distribution rights possessed by debtor. Additionally, PR Logistics was to move everything in the three OTP centers and the Waltham and Edison distribution centers.

The trustee prepared an application to employ PR Logistics to move each store for $785 and to move the contents of a second warehouse in Chantilly for a total of up to $20,000. The trustee later revised the cap figure to $25,000 at a secured creditor's suggestion. The application stated that each store on average contained $110,000 in assets. The

trustee forwarded the application and a copy of the proposed order to Ralph Kresge along with the following declaration which Kresge signed:

Declaration of Mover

I, PR Logistics Ltd. by R.A. Kresge, declare as follows:

1. That I am a duly bonded mover competent to perform the services proposed in the Trustee's application for my employment.

2. That I have read the Application of the Trustee to employ me and I agree to and approve all of the terms and conditions thereof.

3. I am a disinterested person within the meaning of 11 U.S.C. Section 101(13).

I declare under penalty of perjury that the foregoing is true and correct.

PR Logistics, Ltd.
Dated: 1/10/88
By: Ralph A. Kresge /S/

On January 14, 1988, the court authorized the employment of PR Logistics.

At this time PR Logistics was neither licensed as a broker for transportation nor issued a certificate or permit as a motor carrier as 49 U.S.C. s.10921 requires. Nonetheless, PR Logistics brokered the move. Paul Kresge called Richard Dameron of Denver Moving & Storage Company, Inc. ("Denver Moving") and inquired whether it could handle the proposed moves for $500 or $600 per store. Dameron informed Kresge that Denver Moving could not perform the move since it was outside Denver Moving's authorized area. However, on January 13, 1988, Dameron called Joseph Campbell of Campbell's Moving Company, Inc., to refer the business. Campbell and Dameron had a long-standing reciprocal relationship as United Van Lines agents. Campbell said he could do the job for $600 per store.

Campbell knew of PR Logistics involvement from the start of the transaction.

Campbell's commenced work on January 21, 1988, by moving the Atlanta retail store and OTP center. Upon learning that the load far exceeded 4,000 pounds, Campbell called Dameron and insisted upon being paid per his tariff. Dameron relayed the information to Paul Kresge who assented to the demand. Dameron thereafter dropped from the picture.

Ralph Kresge became concerned that the amount of material being shipped exceeded his estimate of 2,000 pounds per store. He met with the trustee and Wendelin Lipp, one of the trustee's attorneys, on January 27, 1988. They discussed what exactly was to be moved. Katchmar and Allen Ashforth, another of debtor's former employees whom the trustee had hired to help in the liquidation, participated via telephone. The parties agreed that the entire contents of the OTP centers and

the stores at Waltham, Edison, and Bensalem, Pennsylvania, were to be moved. At the other retail stores, inventory, demonstration equipment, office supplies and equipment, business records, copiers, postage meters, facsimile machines, and overhead projectors were to be moved. Kresge assured the trustee that the specified move would cost $25,000 or less. He never mentioned that PR Logistics would charge $39.25 per 100 pounds for the move.

Campbell's continued moving the stores. One of the debtor's former employees retained by the trustee would open a store, indicate what had to be moved, and sign the bill of lading. The load would be delivered to Chantilly where Katchmar or Taylor would sign the bill of lading acknowledging delivery. At this time, no charges were on the bills of lading. Katchmar coordinated the move with

Campbell's, scheduling the timing of the moves and arranging to have the stores opened.

Katchmar knew that Campbell's was performing the moves instead of PR Logistics. Katchmar had also known that PR Logistics did not intend to perform the move when it had submitted its proposal. Yet Katchmar never told the trustee any of this information. However, Katchmar had not been involved in PR Logistics' proposal negotiations with the trustee.

Approximately two-thirds through the move, Joseph Campbell became concerned that his firm might not get paid. Paul Kresge had been pressing Campbell's for invoicing information, and Campbell had been evasive as to what the charges would be. Joseph Campbell queried Katchmar and learned the trustee's telephone number. Campbell called the trustee's office on February 11, 1988, and spoke with Wendelin Lipp stating that Campbell's had performed $100,000 worth of work

and sought assurance of payment. Lipp informed Campbell that the trustee had not hired his company and that Campbell's would have to look to PR Logistics for remuneration. Campbell's never billed PR Logistics. Campbell's never contacted the trustee again until billing him, but continued with the move.

After speaking with Campbell, Lipp called PR Logistics and spoke with Paul Kresge, who disavowed any knowledge of Campbell's. Ralph Kresge returned Lipp's call and told her not to worry, that Campbell's was his responsibility, that the move was progressing nicely, and that the job would not cost more than $25,000. Lipp and the trustee let the matter lie. The trustee never contacted Katchmar and asked what was going on. Katchmar continued to coordinate the move, which concluded on February 25, 1988.

The move was massive. Over 300,000 pounds of goods were moved. A large portion of this weight is attributable

to particleboard furniture moved from the Waltham and Edison distribution centers.

The trustee was able to sell debtor's assets, consisting of the moved goods and the goods already present at Chantilly, for $2,850,000. Of that price, $25,000 was allocable to the furniture.

PR Logistics sent the trustee an invoice dated February 11, 1988, for $19,686, corresponding to the proposal. The trustee paid the bill. PR Logistics then sent an invoice dated March 21, 1988, seeking $131,840.77 based on a rate of $39.25 per 100 pounds moved. This is the sum sought in PR Logistics' application for administrative expense.

Campbell's sent the trustee an invoice dated March 3, 1988, for $110,329.26 based on a 25% discount on the tariff rate as calculated by Campbell's. Subsequently, Campbell's sent the trustee another invoice also dated March 3, 1988, for $149.968.41,

which does not include the discount. The second sum was sought in Campbell's application for administrative expense. Campbell's has since amended its application asking $208,378.50, which includes interest and expenses incurred during the pendency of the proceeding.

The court consolidated the hearing of the two applications. All parties extensively briefed the matter.

DISCUSSION

The trustee asserts that Campbell's is a professional person whose employment the court did not authorize and should not authorize nunc pro tunc. As such, Campbell's is an officious intermeddler and should not be compensated. The trustee further argues that PR Logistics has been fully paid for the value of its services.

PR Logistics also urges that Campbell's is an officious intermeddler. However, PR Logistics would have the court pay it in full so that it can in turn pay Campbell's.

Campbell's states that it is entitled to payment at full tariff pursuant to 49 U.S.C. s10761(a), which states:

> **s.10761. Transportation prohibited without tariff.**
>
> (a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege,

> allowing the use of a facility that affects the value of that transportation or service, or another device.

This provision is known as the filed rate doctrine. Campbell's argues that filed rate doctrine admits of no exceptions and that the dictates of 49 U.S.C. s.10101 et seq. override the provisions of the Bankruptcy Code.

This case illustrates the saw about never buying a pig in a poke. The trustee had the pig, that is, debtor's assets of an undetermined scope scattered across the Atlantic Coast. PR Logistics bought the unseen pig assuming it to be a piglet. But the wee little pig turned out to be a great boar borne by Campbell's. Now Campbell's comes seeking to render the hog into meat for its larder through the sausage grinder of Title 49.

Preliminarily, the court notes that the applications for administrative expense are core proceedings under 28 U.S.C.

s.157(b)(2)(A). Additionally, the matters are contested as embraced by Fed.R.Bankr.P. 9014. By virtue of Campbell's position, however, s.157(d) would have been applicable. Section 157(d) states:

> (d) This district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires, consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

This appears to be a matter requiring consideration of both Title 11 and Title 49. In re Maislin Indus., U.S., Inc., 50 BR 943, 947 (BC E.D. Mich. 1985) ("withdrawal is required only when resolution of the proceeding

requires substantial consideration of both.") However, Local Bankruptcy Rule 54.A(2)(c) requires:

> **(c) Withdrawal of Reference of Adversary Proceeding or Contested Matter.**
>
> A motion to withdraw an adversary proceeding or a contested matter which has been referred to the Bankruptcy Court must be filed by the earlier of five (5) days before the date scheduled for the first hearing on the merits and;
>
> (i) in the case of an adversary proceeding, within twenty (20) days after the last pleading is permitted to be filed pursuant to Bankruptcy Rule 7012; or
>
> (ii) in the case of a contested matter, within twenty (20) days after the last memorandum is permitted to be filed pursuant to Local Bankruptcy Rule 30(b)(4).

No motion to withdraw the matter having been filed, the proceeding is properly before this court.

The court also notes that the applications are before this court pursuant to 11 U.S.C. s.503(b)(1)(A), which states:

> **503. Allowance of administrative expenses.**
>
> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including -
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case.

Campbell's application is not made pursuant to 49 U.S.C. s.10761 or s.11903 as Campbell's has intimated. Jurisdiction of matters brought under Title 49 lies with the district court pursuant to 28 U.S.C. 1337. Thurston

Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533 (1983); Madler v. Artoe, 494 F.2d 323 (7th Cir. 1974). This court's jurisdiction is founded on 28 U.S.C. s.1334 and Rule 51 of the Rules of the United States District Court for the District of Maryland. Why Campbell's did not bring an action in district court, this court cannot surmise. Certainly it may have done so. 11 U.S.C. s.323; 28 U.S.C. s.959. Nonetheless, here the matter rests.

In the context of an application for administrative expense, the provisions of Title 49 do not take precedence over those of Title 11. The filed rate doctrine, despite Campbell's exhortations to the contrary, is not absolute. Certainly, the court recognizes the authority descending from Louisville & N.R.R. Co. v. Maxwell, 237 U.S. 94 (1915) that deviation from a filed tariff is impermissible. However, the Supreme Court has also noted that bankruptcy fundamentally alters relationships. See

Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985). A carrier cannot enforce its tariff against a debtor since so doing would frustrate the priority of an equality of distribution to creditors. See In re Roll Form Products, Inc., 662 F.2d 150 (2d Cir. 1981); In re Penn-Dixie Steel Corp., 6 BR 817 (BC S.D.N.Y. 1980), aff'd 10 BR 878 (S.D.N.Y 1981).

Even within the sphere of Title 49, the filed rate doctrine is not absolute; it is subject to the standard of reasonableness provided by 49 U.S.C. s.10701(a), which states:

> **s.10701. Standards for rates, classifications, through routes, rules, and practices.**
>
> (a) A rate (other than a rail rate) classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title must be reasonable. A through route established by such a carrier (including a rail carrier)

> must be reasonable. Divisions of joint rates by those carriers (including rail carriers) must be made without unreasonable discrimination against a participating carrier and must be reasonable.

The Interstate Commerce Commission has announced its policy to review, on reference from a court, unreasonable practices or motor carriers respecting unfiled negotiated tariffs: "We believe, in the highly competitive motor carrier industry and economy in general, equitable defenses to rigid application of filed tariff rates should be available on a case-by-case basis and that our unreasonable practice jurisdiction authorizes such an approach. " National Industrial Transportation League- Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 I.C.C.2d 99 (1986). The ICC policy has sparked opinion pro, Maislin Indus., U.S. Inc. v. Primary Steel, Inc., 1989 U.S. App. Lexis 10205 (8th Cir. July 17, 1989);

In re Breman's Express Co., 92 BR 636 (BC W.D, Pa. 1988); and opinion con In re Campbell Sixty Six Express, Inc., 94 BR 1019 (BC W.D. Mo. 1988); In re Carolina Motor Express, Inc., 84 BR 979 (BC W.D.N.C. 1988). The relevance of this debate here is that it convinces the court that the filed rate doctrine is not as unassailable as Campbell's urges.

Campbell's argument is smoke and mirrors in the context of an administrative fee application. At bottom, this proceeding has been a tri-cornered exercise in finger-pointing with no party totally free from blame. The trustee should have kept closer tabs on the move and his employees. PR Logistics should have done due diligence and not misrepresented its capacity. Campbell's should have made clear on what basis it would bill and ceased working when it clearly had no

authority to continue. But the matter cannot be decided on the basis of what should have happened.

The trustee in the exercise of his business judgment decided to consolidate debtor's assets. Whether he would have done so had he known the actual scope of the move is irrelevant. The trustee informed the court of his decision by seeking authority to employ a mover, and the court ordered such authority. Where a trustee acts under order of the court, the trustee is not liable for a mistake in judgment, only for acts of negligence. Yadkin Valley Bank & Trust Co. v. McGee, 819 F.2d 74 (4th Cir. 1987).

The trustee and PR Logistics would have the court find Campbell's to be a professional person as envisaged by 11 U.S.C. s.327(a), which states:

> **s.327. Employment of professional persons.**
>
> (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or

> more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

As a professional person, Campbell's application would be entertained pursuant to 11 U.S.C. s.330(a), which states:

> **s.330. Compensation of officers.**
>
> (a) After notice to any parties in interest and to the United States trustee and a hearing, and subject to sections 326, 328, and 329 of this title, the court may award to a trustee, to an examiner, to a professional person employed under section 327 or 1103 of this title, or to the debtor's attorney -
>
> (1) reasonable compensation for actual, necessary services rendered by such trustee, examiner, professional person, or

> attorney, as the case may be, and by any para-professional persons employed by such trustee, professional person, or attorney, as the case may be, based on the nature, the extent, and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and
>
> (2) reimbursement for actual, necessary expenses.

The court notes that PR Logistics' fee application was made solely under s.503(b)(1). Compensation awarded under s.330(a) is considered an administrative expense under s.503(b)(2), which states:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including -
>
> * * * * *
>
> (2) compensation and reimbursement awarded under section 330(a) of this title.

Administrative expenses allowed under s.503(b) are given first priority by s.507(a)(1).

A professional person whose employment is not authorized by the court is not entitled to compensation and is considered an officious intermeddler. In re Carolina Sales Corp., 45 BR 750, 751 (BC E.D.N.C. 1985). The reason for such a strict rule is to allow the court to control the burdening of the estate. Id. at 753; In re Ohio River Steel Corp., 65 BR 92, 94 (BC W.D. Ky. 1986). An unauthorized professional may of course be employed nunc pro tunc in extraordinary circumstances.

An often-cited definition of a professional person is found in the case of In re Seatrain Lines, Inc., 13 BR 980, 981 (BC S.D.N.Y. 1981):

> For the purposes of section 327(a), "professional person" is limited to persons in those occupations which play a central role in the administration of the debtor proceeding. Court approval is

> required for the retention of attorneys, accountants, appraisers, auctioneers and persons in other professions intimately involved in the administration of the debtor's estate.

An elaboration of the same standard is found in the case of In re Frederick Petroleum Corp., 75 BR 774 (BC S.D. Ohio 1987):

> Persons who offer services normally performed by professionals, such as appraisers or management consultants, have been designated as professionals, while persons who are involved in the mechanics of a debtor's business have been found not to be within that category of persons. Factors considered by the courts involve not only the nature of the services performed, but also the effect of such person's services upon the administration of the bankruptcy case, and how central that role is to the reorganization proceedings. (Citations omitted).

The trustee and PR Logistics seek to put the court in an untenable position. That is, since PR Logistics' employment was authorized by the court, Campbell's employment must also be authorized by the court. The court disagrees. The authorization of PR Logistics' employment sought by the trustee was a belt-and-suspenders approach to limit trustee's liability. Neither PR Logistics nor Campbell's is a professional person. Moreover, neither party acted professionally in any sense of the word, either as a term of art or otherwise.

The court has found no authority to consider a carrier as a professional person. Courts have added other professionals to list found in s.327(a) of attorneys, accountants, appraisers, and auctioneers; for example, in the case of real estate brokers, In re Cummins, 8 BR 701 (BC C.D.Cal. 1981), rev'd on other grounds, 15 BR 893 (BAP 9th Cir.); In re McConnell, 82 BR 43 (BC S.D.Tex. 1987).

Although the services of a carrier were essential to the trustee's administration in liquidating debtor's assets, the court cannot characterize that role as central. The services rendered were ministerial and involved no exercise of discretion. Organizing, coordinating, and directing the effort fell to Robert Katchmar, not to Campbell's or PR Logistics. Therefore, the court will consider the applications under the standards of s.503(b)(1)(A), which provide:

> **s.503. Allowance of administrative expenses.**
>
> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including -
>
> (1) (A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case.

This is a two-part standard: The services must have been actual and necessary, and the services must have preserved the estate. The standard was described in detail in the case of In re Patch Graphics, 58 BR 743, 745-46 (BC W.D. Wis. 1986):

> An administrative expense may not be allowed absent a finding that the expense is necessary for preserving the estate. In re Club Development & Management Corp., 27 B.R. 610, 612 (Bankr.App. 9th Cir. 1982); In Re Rhymes, Inc., 14 B.R. 807, 808 (Bankr.D.Conn. 1981). Since an administrative expense constitutes a priority claim any recovery must be subject to strict scrutiny by the court. Priority statutes are strictly construed. Standard Oil Company v. Kurtz, 330 F.2d 178, 180 (8th Cir. 1964). The burden of proof is upon the party seeking an administrative claim. See Woods v. City Nat. Bank & Trust Co., 312 U.S. 262, 268, 61 S.Ct. 493, 497, 85 L.Ed. 820 (1941). The terms "actual" and "necessary" contained in 11 U.S.C.

s.503(b)(1)(A) must be narrowly construed in order to keep administrative expenses at a minimum and thus preserve the estate for the benefit of all creditors. In Re O.P.M. Leasing Services, Inc., 23 B.R. 104, 121 (Bankr.S.D.N.Y. 1982); see Otte v. United States, 419 U.S. 43, 53, 95 S.Ct. 247, 254, 42 L.Ed.2d 212 (1974). It is not sufficient merely to show that the debtor exercised "business judgment" in order to support a claim under section 503(b)(1). See Club Development, 27 B.R. at 612. In the present case a mere showing that the equipment in question was purchased as a result of reasonable and prudent business judgment is insufficient. A showing that the equipment was necessary to preserve the estate would also be required. Furthermore, claims under section 503(b)(1)(A) are judged by the actual value received by the estate and not the cost incurred by the creditor. See In Re California Steel Company, 24 B.R. 185, 188 (Bankr.N.D.Ill. 1982); In re Rhymes, Inc., 14 B.R. at 808.

The court has no trouble finding that consolidating debtor's assets was an actual, necessary expense of preserving the estate. Determining the actual value to the estate is more troublesome.

As to Campbell's, the court has reviewed the invoices presented and finds them overstated compared to the value that accrued to the estate. Campbell's performed a great deal of work to move what was essentially worthless furniture. As previously stated, the court is unmoved by the filed rate doctrine. But even if it were, Campbell's has failed to prove the charges claimed. The court has no way to know whether the tariff placed in evidence, ICC HGB 400-E, applies to Campbell's; Tariff No. 101-C, ICC HGB 101-C, showing the carriers to which HGB 400-E applies, was not put in evidence. As nearly as the court can tell, the tariff in evidence was not precisely followed, at least as to the cost of containers and packing rates.

In any case, the court finds the value of Campbell's services to be $100,000. As to Campbell's claim for interest on its administrative expense, the court notes that interest is available in only the most unusual circumstances, which are not present here. See In re International Airways, Inc., 77 BR 490 (BC E.D. Pa. 1987).

As to PR Logistics, the court finds its services provided to be of no value to the estate. Nothing that PR Logistics did benefitted the estate. PR Logistics is largely responsible for this debacle. Ralph Kresge blindly walked into a deal without knowing what he was getting and without the capacity to do anything about it. He misrepresented himself to the trustee and this court, set into motion an unfortunate chain of events, then has the temerity to request payment to boot. The court will refuse to allow any payment and will order disgorgement of those fees already paid.

Many issues remain unresolved: whether Campbell's may sue the trustee for undercharges in district court; whether Campbell's acted reasonably; whether Campbell's will further threaten anyone with the Elkins Act in this matter; whether the trustee is liable to creditors for any negligence; whether the trustee has any cause of action against PR Logistics. None of those issues are properly before this court now. The court does not look forward to hearing any more of this matter.

Orders will be entered in accordance with the foregoing.

DATE: August 28, 1989

s/PAUL MANNES
Chief Judge
United States
Bankruptcy Court
for the District of
Maryland

cc: Roger Frankel
Martin Goozman
Robert Gallagher
David Musgrave
U.S. Trustee

Supreme Court, U.S.
FILED
OCT 30 1991
OFFICE OF THE CLERK

(3)

No. 91-544

In The

Supreme Court of the United States

October Term, 1991

IN RE: MBI BUSINESS CENTERS, INC., t/a The Math Box, t/a Micro South Corporation, d/b/a Computer South, t/a Micro Source Financial, Inc.;
IN RE: PRODIGY SYSTEMS, INC.,

Debtors

CAMPBELL'S MOVING COMPANY, INC.,

Petitioner,

v.

MARTIN L. GOOZMAN, Trustee in Bankruptcy for MBI Business Centers, Inc. and Prodigy Systems, Inc.,

Respondent.

Petition For Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF IN OPPOSITION

Martin L. Goozman, Trustee
9101 Cherry Lane, Suite 207
Laurel, Maryland 20708
(301) 953-7480
Respondent, Pro Se

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Debtors

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Petitioner,

v.

MARTIN L. GOOZMAN, Trustee in Bankruptcy for MBI Business Centers, Inc. and Prodigy Systems, Inc.,

Respondent.

Petition For Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

BRIEF IN OPPOSITION

STATUTES INVOLVED
11 U.S.C. 327(a)

EMPLOYMENT OF PROFESSIONAL PERSONS

(a) Except as otherwise provided in this section, the Trustee, with the Court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons who do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the Trustee in carrying out the Trustee's duties under this title.

11 U.S.C. 364(b)

OBTAINING CREDIT

(b) The court, after notice and a hearing, may authorize the Trustee to obtain unsecured debt other than under subsection (a) of this section, allowable under Section 503(b)(1) of this title as an administrative expense.

11 U.S.C. 503(b)(1)(A)

ALLOWANCE OF ADMINISTRATIVE EXPENSES

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including -

(1)(A) The actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case;

28 U.S.C. 157

PROCEDURES

(a) Each district court may provide that any and all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 shall be referred to the bankruptcy judges for the district.

* * *

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of any party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both Title 11 and other laws of the United States regulating organizations or activities afffecting interstate commerce.

Local District Court Rule 54.A(2)(c)[1]

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[1]The local rules of the United States District Court for the District of Maryland were amended effective July 1989. In addition to substantive changes, the Rules were re-numbered. All references herein are to the Rules in effect during the pendency of the bankruptcy proceedings and reflect the former rule number.

WITHDRAWAL OF REFERENCE OF ADVERSARY PROCEEDING OR CONTESTED MATTER

A motion to withdraw an adversary proceeding or a contested matter which has been referred to the bankruptcy court must be filed by the earlier of five (5) days before the date scheduled for the first hearing on the merits and;

* * *

(11) In the case of a contested matter, within twenty (20) days after the last memorandum is permitted to be filed pursuant to local bankruptcy rule 30(b)(4).

49 C.F.R. 1320.2(a) (1987)

(Reprinted at p. 54, infra.)

49 C.F.R. 1320.3(d) (1987)

(Reprinted at p. 56, infra.)

JURISDICTIONAL GROUNDS

Pursuant to Supreme Court Rule 24.2, the Respondent disagrees that the cause of action arose under 49 U.S.C. 10761(a) and 10762(a)(1) as stated at Pet. for Cert. 6. The Petitioner performed moving services for assets

belonging to a bankruptcy estate. The cause of action arose solely under 11 U.S.C. 503(b)(1)(a), as evidenced by the filing of an application for administrative expenses in the bankruptcy court. Jurisdiction of the United States Court of Appeals for the 4th Circuit was invoked pursuant to 28 U.S.C. 1291 and 1294(1). Jurisdiction of the Supreme Court of the United States was invoked pursuant to 28 U.S. 1254(1).

STATEMENT OF THE CASE

The bankruptcy court's findings of fact are reproduced here from its Memorandum Of Decision, Appendix ("Appx.") to Pet. for Cert. A42-55, as modified by the district court, Appx. to Pet. for Cert. A-18-26. Both the circuit and district courts accepted the statement of facts as found by Judge

Mannes of the bankruptcy court. Appx. to Pet. for Cert. A2-A12; A18-A26. To the extent the Respondent puts forth additional facts, they are included here with references to the circuit court record.

This case was commenced by a voluntary petition under Chapter 11 filed by MBI Business Centers, Inc. (the "Debtor") on September 18, 1987. The Debtor was a retailer of consumer computer equipment which it sold at numerous stores from Boston to Atlanta. Prodigy Systems, Inc., a wholly owned subsidiary of the Debtor, filed its petition on October 13, 1987. On December 18, 1987, the court converted the cases to cases under Chapter 7. Martin L. Goozman (the "Trustee") was appointed trustee of both cases on December 23, 1987.

At the time of the conversion, the Debtor had been operating 22 retail stores as well as three stores located on General Services Administration premises. The stores on government property were known as Office Technology Plus ("OTP") centers. Two of the retail stores, at Waltham, Massachusetts, and Edison, New Jersey, also served as warehouse distribution centers, and the contents of previously closed stores had been collected there.

After his appointment, the Trustee moved swiftly to hire 28 of the Debtor's former employees to assist in liquidating the remaining assets. Among those were Robert Katchmar ("Katchmar"), a former Vice President, and his assistant, Christine Taylor ("Taylor"), who ran the Debtor's main warehouse in Chantilly, Virginia and controlled the

inventory stored there. The court authorized their employment on December 30, 1987.

Shortly before the conversion, IBM engaged PR Logistics Ltd. ("PR Logistics") to establish a bonded warehouse at Chantilly to control its collateral supplied to the Debtor. The conversion of the case rendered this operation pointless. Robert Kresge, president of PR Logistics, thereupon approached Katchmar to offer his company's services in consolidating the Debtor's assets.

In order to formulate a proposal to the Trustee, Ralph Kresge reviewed the Debtor's inventory lists, such as they were, with Katchmar and Taylor. Katchmar and Taylor knew that only the inventory list for the Chantilly warehouse was accurate and that inventory

lists for the 25 retail locations were dubious at best. They told Kresge that the inventory lists could not be relied upon. Nonetheless, Kresge concluded that the 25 retail centers contained an average of 2,000 pounds of inventory. Kresge clung to this conclusion, despite the Trustee's subsequent invitation to visit nearby stores to determine their actual contents. Kresge declined the offer. Ralph Kresge had his brother, Paul, price the proposal based on the 2,000 pound per store figure. Relying on household goods tariffs, Paul Kresge arrived at a cost to move the inventory of $39.25 per 100 pounds, or $785.00 per ton.

Ralph Kresge presented the Trustee with a handwritten and typed proposals, both dated December 29, 1987. The proposals were the same except the

typed proposal contained a breakdown of costs for the services proposed. The proposal offered to move product from the 25 centers to the Chantilly warehouse for $785.00 per center or $19,625.00 total. Additionally, PR Logistics offered to coordinate the liquidation of the Debtor's assets.

The Trustee was only interested in PR Logistics' offer to move the inventory inasmuch as he had already hired the Debtor's former employees to coordinate the liquidation. Since the conversion of the case, the Trustee, in concert with the secured creditors, had considered whether it would be wiser to liquidate the inventory piecemeal from each retail location or to consolidate the inventory and dispose of it through a single sale. The PR Logistics proposal made the latter course feasible and more

attractive than piecemeal liquidation. Had the Trustee known the true cost of the move, he would not have consolidated the assets.

All agreed that PR Logistics was to move the inventory, demonstration computer equipment, and office equipment at the 22 stores. The fixtures and furniture were not to be moved since this consisted for the most part of particleboard furnishings used to display the inventory and was of substantial weight and largely without value. These furnishings would only be of value to potential purchasers of IBM distribution rights possessed by the Debtor who would continue to operate a computer business at the retail location. Additionally, PR Logistics was to move everything in the three OTP centers and the inventory in the Waltham and Edison distribution

centers.

The Trustee prepared an application to employ PR Logistics to move each store for $785.00 and to consolidate the contents of a second warehouse in Chantilly in the main warehouse for a total of up to $20,000.00. The Trustee later revised the maximum allowable cost to $25,000.00 to cover any unforseeable costs. The application stated that each store on average contained $110,000.00 in assets. The Trustee forwarded the application and a copy of the proposed order to Ralph Kresge along with the following declaration which Kresge signed:

Declaration of Mover

I, PR Logistics Ltd. by R.A. Kresge, declare as follows:

1. That I am a duly bonded mover competent to perform the services proposed in the Trustee's application for my employment.

2. That I have read the Application of the Trustee to employ me and I agree to and approve all of the terms and conditions thereof.

3. I am a disinterested person within the meaning of 11 U.S.C. Section 101(13).

I declare under penalty of perjury that the foregoing is true and correct.

PR Logistics, Ltd.
Dated: 1/10/88
By: Ralph A. Kresge /s/

On January 14, 1988, the court authorized the employment of PR Logistics.

Unknown to the trustee, at this time PR Logistics was neither licensed as a broker for transportation nor issued a certificate or permit as a motor carrier as 49 U.S.C. Section 10921 requires. Nonetheless, PR Logistics brokered the move. Paul Kresge called Richard Dameron ("Dameron") of Denver Moving & Storage Company, Inc. ("Denver Moving") and inquired whether it could handle the

proposed moves for $500.00 or $600.00 per store. Dameron informed Kresge that Denver Moving could not perform the move since it was outside Denver Moving's authorized area. However, on January 13, 1988, Dameron called Joseph Campbell ("Campbell") of Campbell's Moving Company, Inc. ("Campbell's") to refer the business. Campbell and Dameron had a long-standing reciprocal relationship as United Van Lines agents. Campbell said he could do the job for $600.00 per store. Campbell knew of PR Lgistics' involvement from the start of the transaction.

Campbell knew that the moves were being done for a bankruptcy trustee within a day or so of January 13, 1988, when he had called Katchmar, and alleges that Campbell's was hired by the Trustee as a result of a telephone conversation

with Paul Kresge on January 19, 1988, when Kresge represented himself as a representative of the Trustee. Dameron, however, understood that PR Logistics was to pay Campbell's since he and Campbell had made the arrangements with PR Logistics, and Paul Kresge would be paying Campbell's. Campbell does not consider that Campbell's was hired by PR Logistics or Denver Moving. In any event, Campbell's was not hired by the Trustee.

Campbell's commenced work on January 21, 1988, by moving the Atlanta retail store and OTP center. Upon learning that the load far exceeded 4,000 pounds, Campbell called Dameron and insisted upon being paid per his tariff. Dameron relayed the information to Paul Kresge who assented to the demand. Dameron thereafter dropped from the picture.

Ralph Kresge became concerned that the amount of material being shipped exceeded his estimate of 2,000 pounds per store. He met with the Trustee and Wendelin Lipp, one of the Trustee's attorneys, on January 27, 1988. They discussed what exactly was to be moved, but not the involvement of Campbell. Katchmar and Allen Ashforth, another of the Debtor's Vice-Presidents whom the Trustee had hired to help in the liquidation, participated via telephone. The parties agreed that the entire contents of the OTP centers and the stores at Waltham, Edison, and Bensalem, Pennsylvania, were to be moved. At the other retail stores, inventory, demonstration equipment, office supplies and equipment, business records, copiers, postage meters, facsimile machines, and overhead projectors were to be moved.

Kresge assured the Trustee that the specified move would cost $25,000.00 or less. He never mentioned that PR Logistics would charge $39.25 per 100 pounds for the move.

The Trustee again advised Kresge that he was totally unaware of what was contained in Waltham and Edison (Tr. P518 L9-P520 L3). As such, Kresge was admonished not to move anything which would cause the cap of $25,000.00 to be exceeded without first communicating back to the Trustee (Tr. P475 L21-P476 L4, P523 L4-7). Kresge, however, indicated that there was no problem insofar as exceeding the cap was concerned (Tr. P470 L6-P471 L7, P522 L13-17). The Trustee was at this time still unaware that PR Logistics was not personally performing the physical moving operation.

Campbell's continued moving the

stores. One of the Debtor's former employees retained by the Trustee would open a store, indicate what had to be moved, and sign the bill of lading. The load would be delivered to Chantilly where Katchmar or Taylor would sign the bill of lading acknowledging delivery. At this time, no charges were on the bills of lading. Katchmar coordinated the move with Campbell's, scheduling the timing of the moves and arranging to have the stores opened.

Katchmar knew that Campbell's was performing the moves instead of PR Logistics. Katchmar had also known that PR Logistics did not intend to perform the move when it had submitted its proposal. Yet Katchmar never told the Trustee any of this information. However, Katchmar had not been involved in PR Logistics' proposal negotiations

with the Trustee. Katchmar was familiar with PR Logistics' flat rate proposal and, while aware of Campbell's involvement, assumed that Campbell's was simply doing the moving jobs for PR Logistics pursuant to the flat rate proposal.

Approximately two-thirds through the move, Campbell became concerned that his firm might not get paid. Paul Kresge had been pressing Campbell's for invoicing information, and Campbell had been evasive as to what the charges would be. Campbell queried Katchmar and learned the Trustee's telephone number. Campbell called the Trustee's office on February 11, 1988, and spoke with Wendelin Lipp, Trustee's counsel, stating that Campbell's had performed $100,000 worth of work and sought assurance of payment. Lipp

informed Campbell that the Trustee had not hired his company and that Campbell's would have to look to PR Logistics for remuneration. Campbell's never billed PR Logistics. Campbell's never contacted the Trustee again until billing him, but continued with the move.

The invoices submitted by Campbell's indicate that between January 23, 1988 and February 11, 1988, Campbell's had moved 224,510 pounds for a total non-discounted amount of $86,761.27 (original invoices provided a 25% discount for an aggregate discounted cost of $65,070.95) (Exhibits in circuit court record ["Ex."]) pp. 530-54). The invoices submitted by Campbell's further indicate that subsequent to February 11, 1988, on February 18, 1988 and February 24, 1988, Campbell's moved an additional 146,700 pounds at a non-discounted cost

of $59,471.99 (original invoices provided a 25% discount for an aggregate discounted cost of $44,603.99) (Id).

After speaking with Campbell, Lipp called PR Logistics and spoke with Paul Kresge, who disavowed any knowledge of Campbell's. Ralph Kresge returned Lipp's call and told her not to worry, that Campbell's was his responsibility, that the move was progressing nicely, and that the job would not cost more than $25,000.00. Katchmar and asked what was going on. Katchmar continued to coordinate the move, which concluded on February 25, 1988.

The move was greater than anticipated and over 300,000 pounds of goods were moved. A large portion of this weight was attributable to particleboard furniture moved from the Waltham and Edison distribution centers.

The invoices submitted by Campbell's indicate that Campbell's moved a combined weight of 173,060 pounds from both the Waltham and Edison centers for a total non-discounted cost in the amount of $61,531.80, $46,140.85 discounted (Ex. pp 530-54).

The Trustee was able to sell the Debtor's assets, consisting of the moved goods and the much larger amount of goods already present at Chantilly, for $2,850,000.00. Of that price, $25,000.00 was allocable to the furniture.

PR Logistics sent the Trustee an invoice dated February 11, 1988 for $19,686.00, corresponding to the proposal. The Trustee paid the bill. PR Logistics then sent an invoice dated March 21, 1988, seeking $131,840.77 based on a rate of $39.25 per 100 pounds moved. This was the sum sought in PR Logistics'

application for administrative expenses filed in the bankruptcy court.

Campbell's sent the Trustee an invoice dated March 3, 1988 for $110,329.26 based on a 25% discount on the tariff rate as calculated by Campbell's. Subsequently, Campbell's sent the Trustee another invoice also dated March 3, 1988, for $149,968.41, which does not include the discount. The second sum was sought in Campbell's application for administrative expense filed in the bankruptcy court. Campbell's has since amended its application asking for $208,378.50, which includes interest and expenses incurred during the pendency of the proceeding.

The bankruptcy court denied the application of FR Logistics and, further, ordered it to repay the amount previously paid to it, $19,686.00, to the Trustee,

and allowed Campbell's an administrative claim in the amount of $100,000.00.

The bankruptcy court found that the matter appeared to be one requiring consideration of both Title 11 and Title 49, that jurisdiction of matters brought under Title 49 lies with the district court pursuant to 28 U.S.C. 1337, Appx. to Pet. for Cert. A58-A61, and that Campbell's did not seek withdrawal of the reference as it was entitled pursuant to 28 U.S.C. 157(d) and Local District Court Rule 54.A(2)(c). Id. The bankruptcy court then found that Campbell's application for administrative expenses was not made pursuant to Title 49, United States Code, but rather pursuant to Title 11, United States Code, specifically section 503(b)(1)(A), and that in the context of an application for administrative expense, "the provisions

of Title 49, do not take precedence over those of Title 11," Appx. to Pet. for Cert. A60-61.

The Trustee appealed both the allowance of an administrative expense to Campbell's and the amount of the allowance. Campbell's cross-appealed the denial of its full tariff rate.

The district court overturned the bankruptcy court decision in part and awarded Campbell's an administrative claim in the amount of $25,000.00, with $5,314.00 thereof to be paid by the Trustee and $19,686.00 thereof to be paid by PR Logistics. The district court agreed that Title 11, not Title 49, controls this action. Appx. to Pet. for Cert. A27.

In overturning the prior opinion, the district court stated,

> . . .This court is unconvinced that a moving expenditure totalling nearly

20% of the total amount of money collected is beneficial to the estate. The Trustee had made an agreement with PR Logistics to move the assets of the estate based upon the cost estimate of $25,000.00. The move, if it had cost $25,000.00, would have been benefical to the estate. However, a move which costs in excess of $100,000 could only be considered detrimental and an expense which was incurred primarily in the interest of the claimant. Patch Graphics, 58 B.R. at 745 (Bkrtcy. W.D. Wis. 1986). Accordingly, the $100,000 moving expenses do not qualify as an administrative [expense] under section 503(b)(a). (footnote omitted).

* * *

...bills of lading were signed at all but 7 locations. (citation omitted) The bills had Campbell's name at the top. Significantly, however, the bills of lading do not indicate the charges incurred by the move or the tariff rate.

* * *

...Katchmar and the other MBI employees were agents of the Trustee... However, it is significant that the bills of lading were not filled out when signed. Katchmar and the other employees believed that the move would cost a flat fee of $25,000. The fact that the bills of lading were blank substantiated that

> understanding. Moreover, although Katchmar knew that Campbell's was working with PR Logistics on the move, he was never informed that Campbell's was working under a different agreement than the one originally signed with PR Logistics.
>
> * * *
>
> ...Campbell's services were authorized through agency principles. Indeed, the work Campbell's performed benefitted the estate in the same way that PR Logistics services would have benefitted the estate. Therefore, the only solution to this dispute is that the estate should compensate Campbell's for the work performed pursuant to the terms of the agreement signed by PR Logistics.
>
> * * *
>
> ...[T]he terms of that agreement govern the operation of the move from the outset, and cannot be changed in the interim based upon unauthorized acts committed by Ralph Kresge and PR Logistics.

Appx. to Pet. for Cert. A31-38.

Campbell's appealed the district court's denial of compensation at its full tariff rate. The Trustee appealed Campbell's entitlement to an

administrative award.

The fourth circuit affirmed the district court opinion by "agree[ing] with the reasoning and conclusions set forth in the opinion of the district court, ..." Appx. to Pet. for Cert. A15.

The court added, however,

> A few salient facts are worth reiterating, however. Campbell's never contracted with, nor even spoke to, the bankruptcy trustee directly, nor did Campbell's ever inform the Trustee or his employees that Campbell's would demand payment of its tariff rate. Furthermore, Campbell's never sought nor obtained the advance approval of the bankruptcy court.
>
> Campbell's failed to take the steps necessary to insure payment of its tariff rate. Campbell's is not now entitled to an order compelling the Trustee to pay more than eight times the price he agreed to pay for the transportation of the assets of the bankruptcy estate.

Appx. to Pet. for Cert. A15-16.

Campbell's Petition for Writ of Certiorari followed.

REASONS FOR DENYING THE WRIT

Campbell's petition identifies one question presented. It argues that this Court should grant the Writ to decide whether a trustee in bankruptcy is exempt from the provisions of Title 49, United States Code in the shipment of estate assets. It argues that the court of appeals decision conflicts with decisions of this Court and with decisions of other circuits. The Writ should be denied for two reasons.

First, the opinion of the court of appeals is not in conflict with the recent decision of Maislin Industries, Inc., Et Al. v. Primary Steel, Inc., 497 U.S. _____ (1990), or any other opinion of this Court interpreting Title 49, United States Code. The application was not filed under Title 49. The court of appeals decision in this case rests

entirely on Title 11, not Title 49. Campbell's has cited no decision under Title 11 which awards a carrier the amount of its filed tariff schedule on an application for administrative expenses, and no case has been found by the Trustee.

Second, even if this Court were to hold that Title 49 and Title 11 may be harmoniously construed and imposed on a trustee in bankruptcy in the context of an application for administrative expenses, the facts of this case dictate that the imposition of the filed tariff schedule is not warranted. Campbell's was never employed by the Trustee. It never contracted with the Trustee to perform the services rendered. The services did not benefit the estate commensurate with the amount of the tariff charges. Furthermore, Campbell's

engaged in unreasonable practices in its conduct in the moving transactions. Accordingly, even if the Writ were granted, this Court could not resolve this case by holding that the aforesaid statutes may be harmoniously construed.

A. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT OR WITH DECISIONS OF ANOTHER COURT OF APPEALS ON THE SAME MATTER.

In Maislin, this Court reaffirmed the viability of the filed rate doctrine of Title 49, United States Code. However, neither Maislin nor any case cited by Campbell's throughout the pendency of these proceedings has involved facts similar to those presented by the instant case. Maislin involved collection of prepetition freight undercharges by a carrier's trustee in bankruptcy. The undercharges had resulted from the shipper paying the

carrier a negotiated rate in an amount less than the carrier's filed tariff schedule. This case involves a carrier's compensation on an application for administrative expenses filed in bankruptcy court pursuant to 11 U.S.C. 503.

Campbell's has cited no case which held that Title 49 prevails over Title 11 in administrative expense litigation commenced and litigated in the bankruptcy court. Each of the lower court opinions held that this matter was properly decided under Title 11, United States Code. The cases interpreting the filed rate doctrine of 49 U.S.C. 10761, mandated by this Court in Louisville and N.R.R. Co. v. Maxwell, 237 U.S. 94 (1915) and its progeny through Maislin have been determined solely upon Title 49, United States Code. This case was decided

solely under Title 11, United States Code. There is, therefore, no conflict.

Campbell's application for administrative expenses was filed under 11 U.S.C. 503(b)(1)(A). It invoked bankruptcy court jurisdiction under 28 U.S.C. 1334(b) and Local District Court Rule 51. The application was a core proceeding under 28 U.S.C. 157(b)(2)(A). An action which invokes the bankruptcy court's jurisdiction must be decided pursuant to the provisions of Title 11, even in the face of competing or conflicting federal law. Cf. N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513 (1984) (rejection of collective bargaining agreement not a violation of 8(d) of National Labor Relations Act, in part, because of policy of bankruptcy code to give debtor-in-possession some flexibility and breathing space); In re

Arthur, 86 B.R. 98 (Bkrtcy. W.D. Mich. 1988) (Title 11, United States Code takes precedence over Title 12, United States Code, in part, because Chapter 12 bankruptcy is designed to give family farmers a fighting chance to reorganize).

Despite the bankruptcy context of this administrative proceeding, Campbells has consistently maintained that it is entitled to be compensated pursuant to its filed tariff schedule and not pursuant to 11 U.S.C. 503(b)(1)(A), the bankruptcy statute upon which its case against the Trustee is grounded. Campbell's contends its claim is asserted pursuant to the filed rate doctrine of 49 U.S.C. 10761. Campbell's had the opportunity to remove the case to the district court since the case apparently involved a consideration of both Title 11 and other laws of the United States

effecting interstate commerce, pursuant to 28 U.S.C. 157(d) and pursuant to Local District Court Rule 54.A(2)(c). The application for administrative expenses remained in the bankruptcy court, however, and was therefore decided under the Bankruptcy Code.[2]

Each of the lower courts held that Title 11, not Title 49, controlled this action. Appx. to Pet. for Cert. A-15., A-26-27., A-57-61. It is therefore not the case, as argued, that the provisions of the filed rate doctrine had been relaxed or ignored, Pet. for Cert. 19-20., 22., by any of the lower courts when deciding this case.

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[2]Subsequent to the decision of the bankruptcy court, Campbell's filed a lawsuit against the Trustee in the district court, Case No. HAR-91-76, grounded in Title 49, United States Code. The prosecution and defense of this lawsuit has been stayed by consent of the parties pending the outcome of the appeals hererin.

A trustee in bankruptcy represents the creditors and has a duty to maximize the value of the estate to provide for an equitable distribution of estate property to creditors. Louisiana World Exposition v. Federal Insurance Co., 858 F.2d 233, 246 (5th Cir. 1988); see also, In Re Wilson, 94 B.R. 886, 892 (Bkrtcy. E.D. Va. 1989). The framework which governs the work of the Trustee is the bankruptcy code. Id. Insolvency is a most important and material fact, not only with individuals but with corporations. With the latter as with the former, the mere fact of insolvency may change radically and materially its rights and obligations. Commodity Futures Trading Comission v. Weintraub, 471 U.S. 343, 357 (1985).

A carrier cannot enforce its tariff against a debtor in bankruptcy

since so doing would frustrate the priority of equal distribution to the debtor's creditors. See generally, Roll Form Products, Inc., 662 F.2d 150 (2nd Cir. 1981); In Re Penn-Dixie Steel Corp., 6 B.R. 817 (Bkrtcy. S.D.N.Y. 1980), aff'd 10 B.R. 878 (D. S.D.N.Y. 1981). Campbell's argues that the lower courts erred by relying on these cases since these cases dealt with prepetition debt. Pet. for Cert. 16-17. This reliance is not error. Each case demonstrates the impact of bankruptcy on the collection of a full tariff rate.

Title 11 also prevailed over Title 49 where the bankruptcy court for the Southern District of New York enjoined a carrier's efforts to collect prepetition freight charges directly from the debtor's consignees stating, "[T]he rights and duties created by the

Interstate Commerce Act are for the protection of the public against secret rebates and discriminations rather than for the enrichment of the carrier....the instant proceeding involves an attempt by [the carrier] to wrongfully enrich itself by utilizing the ICA to circumvent the orderly asset distribution scheme mandated by the bankruptcy code." In re Chateaugay Corp., 78 B.R. 713, 721 (Bkrtcy. S.D.N.Y. 1987). While Chateaugay also involved the collection of prepetition freight charges, it illustrates the impact of bankruptcy upon the collection of prepetition freight charges owed by the debtor, with collection efforts aimed at nondebtor consignees being stayed so as not to interfere with the orderly distribution of estate assets.

The bankruptcy cornerstone

policy of equality of distribution to creditors again led to the provisions of Title 11 prevailing over Title 49 where a trustee was allowed to recover a preference under 11 U.S.C. 547 from a carrier, even though the recovery would result in the carrier not being paid its full tariff rate pursuant to its filed tariff schedule. See, In Re Service Bolt & Nut Co., Inc., 98 B.R. 759, 762 (Bkrtcy. N.D. Ohio 1989). (bankruptcy court must have the power to protect its jurisdiction to assure that the fundamental policies of bankruptcy law are subserved).

Campbell's contention that bankruptcy law is inapplicable to the facts of this case is predicated on a characterization of facts not supported by the record. Campbell's was not employed by the Trustee. The Trustee

employed PR Logistics to perform the moving services. The fact that PR Logistics was an unlicensed transportation broker is not relevant. PR Logistics was not hired by the Trustee to broker the moves, but rather to perform the moving services. Moreover, PR Logistics misrepresented its capacity to both the bankruptcy court and the Trustee. Appx. to Pet. for Cert. A75. The actions of PR Logistics, not the actions of the Trustee, led to Campbell's involvement.

Campbell's assertion that "[o]n January 21st, 1987, pursuant to the instructions of an agent of the Trustee in Bankruptcy, Campbell's began picking up the goods of the estate and delivering them to a central warehouse in Chantilly, Virginia," Pet. for Cert. 8. (emphasis added), is evidence of this

mischaracterization of fact, and is squarely contraverted by the district court opinion that "[t]he terms of [the] agreement [between the Trustee and PR Logistics] governed the operation of the move from the outset, and cannot be changed in the interim based upon unauthorized acts committed by Ralph Kresge and PR Logistics. Appx. to Pet. for Cert. A-38 (emphasis added).

None of the lower courts ever lost sight of the fact that moving services were used by the Trustee only after he performed a cost-benefit analysis which did not consider the cost of moving services in the amount sought by Campbell's, and that the Trustee accepted PR Logistic's bid in the amount of $25,000.00 for moving services concluding, as a result of that bid, that consolidation of the assets was feasible.

Appx. to Pet. for Cert. A-15., A-31.-32., A-46. Campbell's has never acknowledged the significance of these facts, but instead baldly maintains that a carrier is not responsible for a shipper's profit or lack thereof, Pet. for Cert. 20-21., and that it is absolutely entitled, under the filed rate doctrine, to be paid by the Trustee pursuant to its filed tariff schedule. The essence of Campbell's argument is an outright denial that a trustee in bankruptcy is obligated to perform his duties pursuant to the bankruptcy code and a denial of the fact that it was not employed by the Trustee.

It is respectfully submitted that the circuit court decision was correctly decided under Title 11, United States Code. The decision fully recognized the filed rate doctrine of Title 49, United States Code and is not

in conflict therewith, nor with any case construing Title 49, United States Code. This court should deny the Writ on this ground alone.

B. EVEN IF THIS COURT WERE TO FIND THAT TITLE 49, UNITED STATES CODE IS HARMONIOUS WITH TITLE 11, UNITED STATES CODE, CAMPBELL'S MOVING COMPANY, INC. IS NOT ENTITLED TO ITS FULL TARIFF RATE IN THIS CASE.

A decision by this Court that provisions of Title 49, United States Code apply to an application for administrative expenses under Title 11, United States Code would not resolve the case between Campbell's and the Trustee.

1. Campbell's Moving Company, Inc.'s full tariff rate would not be allowed as an administrative expense of the bankruptcy estate.

Under the facts of this case, the amount of Campbell's filed tariff schedule would not be allowed as an administrative expense. The Trustee did

not hire Campbell's to perform any services for the estate. The Trustee never agreed to pay Campbell's filed tariff schedule. Cf. In Re Jartran, Inc., (Jartran 1), 732 F.2d 584, 587 (7th Cir. 1984) (a debt accorded administrative priority under 11 U.S.C. 503(b) must arise from a transaction with the trustee); accord, In Re Mammoth Mart, Inc., 536 F.2d 950, 954 (1st Cir. 1976).

Campbell's employment was not approved by the bankruptcy court pursuant to 11 U.S.C. 327(a) as the employement of a professional person or pursuant to 11 U.S.C. 364(b) to enable the Trustee to incur unsecured debt.[3]

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[3]It is acknowledged that the Trustee has not prevailed in the lower courts on his argument that Campbell's employment required approval as a professional person. However, the court of appeals commented, as a salient fact, that "Campbell's never sought nor obtained the advance approval of the bankruptcy

(Footnote continued)

Under Title 11, United States Code, an administrative claim as a priority claim mandates strict scrutiny by the court to keep fees and expenses at a minimum so as to preserve the estate for the benefit of all creditors. In Re Patch Graphics, 58 B.R. 743, 745, (Bkrtcy. W.D. Wis. 1986); In Re O.P.M. Leasing Services, Inc., 23 B.R. 104, 121 (Bkrtcy. S.D.N.Y. 1982). The amount of an administrative claim is determined by the actual value received by the estate from the alleged services. Id. Costs incurred by an administrative claimant are not relevant to a determination of

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[3](continued)
court." Appx. to Pet. for Cert. A-16. It is submitted that an expense in the amount of Campbell's tariff rate required, at minimum, notice to creditors and prior authorization of the bankruptcy court pursuant to 11 U.S.C. 364(b). Cf. In Re Glover, Inc., 43 B.R. 322 (Bkrtcy. D. N.M. 1984) (quoting H.R. No. 95-989, 95th Cong. 2nd Sess. 57 (1978), U.S. Code

(Footnote continued)

the value of an allowed administrative claim. Patch, supra at 746. Likewise, as found by all of the lower courts, the filed rate doctrine of title 49 is not relevant to such determination in administrative expense litigation commenced and litigated in the bankruptcy court.

Campbell's services were not necessary to the preservation of the estate. See generally, Patch, supra; O.P.M. Leasing Services, supra. PR Logistics' proposal made consolidation of the assets feasible rather than liquidation of the assets from several locations. An alternative plan had been discussed and would have been instituted had the true cost of the move been known to the Trustee and the secured creditors.

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[3](continued)
Cong. & Admin. News 1978, pp. 5787, 5843.)

Appx. to Pet. for Cert. A46. It was not necessary to employ a mover when the costs incident to the mover's services were such to render consolidation not feasible. It was not necessary to consolidate the assets in order to liquidate them and preserve the estate.

Much of the poundage moved by Campbells was of nominal value, particleboard furniture moved primarily from the Waltham and Edison distribution centers. Of the total 371,210 pounds moved by Campbells, 146,700 pounds were moved from Waltham and Edison. The inventory and equipment involved in the consolidation effort involved a limited amount of new inventory, and primarily involved demonstration inventory and internal use equipment. (Transcript in circuit court record ["Tr."] P506 L6-13). The new inventory sold for approximately

$.34 per dollar cost value and the used and demonstration inventory and equipment sold for approximately $.24 per dollar cost value. (Tr. P 526 L5-9). The majority of the Debtor's new inventory was already located at the Chantilly warehouse. While the Trustee sold the Debtor's inventory, equipment, and furniture for the amount of $2,850,000.00, only $25,000.00 of the price was allocable to the furniture. Moreover, the sale was comprised of assets already present at the Chantilly warehouse. Appx. to Pet. for Cert. A-53-54. Campbell's, therefore, performed extensive work moving worthless assets.

The Trustee and the secured creditors had determined the feasibility of the consolidation effort based on the $25,000.00 fee arrangement with PR

Logistics. The Trustee would not have employed any mover had he known the assets would be moved at tariff rates. Campbell's argues that a cost-benefit analysis is meaningless to determine the value of services once the services have been rendered. Id. Absent bankruptcy, this argument has merit. A post-fact analysis was not being done, however. A cost-benefit analysis must be performed before incurring an administrative expense in bankruptcy. Cf. Patch, supra; O.P.M. Leasing Services,, supra. This is exactly what the Trustee did in this case, as upheld by the circuit court.

It is respectfully submitted that the amount of the administrative claim allowed to Campbells, $25,000.00, is appropriate and commensurate with the actual value received by the estate from its services. Accordingly, even if Title

49, United States Code would apply to an application for administrative expenses filed under Title 11, United States Code, the standards for the allowance of an administrative claim would not result in the allowance of a claim in the amount of Campbell's filed tariff schedule.

2. Campbell's Moving Company, Inc. is not otherwise entitled to be paid its full tariff rate.

Alternatively, Campbell's did not prove it was otherwise entitled to be paid its full tariff rate.

Both the bankruptcy court and the district court found that Campbell's did not supply any evidence to show that it participated with the tariff placed in evidence, to wit: ICC HGB 400-E. Tariff No. 101-C ICC HGB 101-C, showing the carriers to which HGB 400-E applies was not put in evidence. Appx. to Pet. for Cert. A-37; A-74.[4]

Campbell's practices in the conduct of the moving transactions at issue were unreasonable. This Court in Maislin left unresolved whether a carrier's unreasonable practice justifies departure from the filed rate doctrine. Maislin Industries, U.S., Inc. supra, Slip Op. No. 89-624 at 11-12. As this Court stated:

> The [ICC] argues that under the filed rate doctrine, a finding that a carrier engaged in an unreasonable practice should, like the finding that a filed rate is unreasonable, disentitle the carrier to collection of that filed rate. We have never held that a carrier's unreasonable practice justifies departure from the filed tariff schedule. But we need not resolve this issue today....

Id. (emphasis added). This Court

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[4]Further, the district court denied Campbell's motion to supplement the record with Tariff No. 101-C, ICC HGB 101-C, pursuant to F.R. Civ. P. 52(b). Appx. to Pet. for Cert. A37.n.5.

overturned the Negotiated Rates[5] cases on the ground that the carrier does not engage in an unreasonable practice when it attempts to collect the filed rate after the parties have negotiated a lower rate. See generally, Maislin, supra.

This case presents five (5) instances of unreasonable practice warranting deviation from the filed tariff schedule.

First, the bankruptcy court found that Campbell's did not follow the tariff in regard to the cost of containers and packing rates. Appx. to Pet. for Cert. A-74. Campbell testified that it is common industry practice to

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[5] NITL-Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 3 I.C.C. 2d 99 (1986) (Negotiated Rates I); NITL-Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 5 I.C.C. 2d 623 (1989) (Negotiated Rates II).

obtain a customer's prior authorization for additional services and supplies, evidenced by the customer's signature on an "Addditional Services Performed" form. He further testified that no signatures were obtained on such forms, either from the Trustee or anyone else involved in the moving operation (Tr. P358 L7-19, P361 L5-8). No evidence was thus proferred to show that any additional services were ordered or authorized, yet Campbell's attempts to be compensated for such services.

Second, the first invoices sent by Campbell's to the Trustee, dated March 3, 1988, amounted to $110,329.26 and included a 25% discount from the applicable tariff rate. Subsequent thereto, Campbell's submitted to the Trustee a second set of invoices, also dated March 3, 1988, which amounted to

$149,968.49, not discounted. Campbell testified that the 25% discount had been originated by mistake (Tr. P338-39) and that the higher bill was the correct amount due. It defies reason that an experienced moving company as Campbell's would make such a mistake. It is doubted that Campbell's routinely submits bills which understate its charges by an amount in excess of $35,000.00.

Third, although Campbell testified that it is common industry practice to obtain both tare and gross weights at the same weigh station (Tr. P367-68), half the invoices submitted indicate that Campbell's did not obtain gross and tare weights at the same weigh station. This presents serious questions regarding the accuracy of the weight of the assets as stated on the bills of lading.

Fourth, Campbell's apparently

violated both federal regulations and the provisions of its own bills of lading by both its extension of credit to the Trustee and its release of the assets prior to payment. The bills of lading state that, "credit will not be extended without approval in advance of shipment." The applicable federal regulation in force at the time of the moving transactions in this case, contained at 49 C.F.R. 1320.2 (1987), stated as follows:

EXTENTION OF CREDIT TO SHIPPERS.

(a) Authorization to extend credit.

(1) A carrier that meets the requirements in paragraph (a)(2) of this section may -

(i) relinquish possession of freight in advance of the payment of the tariff charges, and

(ii) extend credit in the amount of such charges to those who undertake to pay them (such persons are called "shippers" in this part)

(2) For such authorization, the carrier shall take reasonable actions to assure

payment of the tariff charges within the credit periods specified -

(i) in this part, or

(ii) in tariff provisions published pursuant to the regulations in paragraph (d) of this section. (emphasis added.)

It is undisputed that Campbells made no arrangements with the Trustee in regard to any extension of credit for moving services as required by its bills of lading. Furthermore, Campbell's took no reasonable actions to assure payment of the tariff charges prior to relinquishing possession of the assets. While one may not surmise why Campbell's undertook to move the assets of the bankruptcy estate without making any arrangement at all for payment, the fact remains that it did so, and now seeks to assess the Trustee its full tariff rate for such services. In point of fact, after being told by Ms. Lipp that Campbell's had not been employed by the

Trustee and had no authority to be in possession of estate assets, Campbell continued with the move by his own design since, according to the evidence, Campbell's was "into this job so far already." (Tr. P316 L21-P317 L5, P398 L8-14).

Fifth, Campbell's apparently violated additional federal regulations by its untimely submission to the Trustee of invoices for its services. The applicable federal regulations in force at the time of the moving transactions in this case, 49 C.F.R. 1320.3(d) (1987), stated as follows:

PRESENTATION OF FREIGHT BILLS

(d) When the carrier lacks sufficient information to compute tariff charges.

(1) When information sufficient to enable the carrier to compute the tariff charges is not then available to the carrier at its billing point, the carrier shall present its first bill for payment within seven days following the day upon which sufficient information becomes available at the billing point. This

time period does not include Saturdays, Sundays, or legal holidays.

Campbell testified that in accordance with industry practice the bills of lading used to support the tariff charges were blank when signed by a representative of the Trustee, (Tr. P356 L6-14), but were later calculated at his office (Tr. P356 L15-19). The moves in question commenced on January 23, 1988. Despite the aforereferenced regulation, no freight charges were submitted to the Trustee until at least March 3, 1988, a point in time in excess of the period in which Campbell's was required to submit said invoices.

Instances four and five create serious questions regarding Campbell's motivations in performing the moves. Each involves the possible violation of federal regulations which, if complied with, would have resulted in the Trustee

being confronted by Campbell's presence early in this matter, as opposed to two-thirds of the way through. It will never be known whether the case would have progressed as it did had Campbell submitted timely invoices to the Trustee. Moreover, as found by the bankruptcy court, "Paul Kresge had been pressing Campbell's for invoicing information and Campbell had been evasive as to what the charges would be, Appx. to Pet. for Cert. A-52, and that, "Campbell's should have made clear on what basis it would bill." Appx. to Pet. for Cert. A-64-65.

The foregoing are examples of unreasonable practices by Campbell's in the rendering of services in the consolidation effort, and compel the conclusion that it would be inequitable to allow Campbells compensation pursuant to its full tariff rate. Cf.

Consolidated Freightways Corp. of Deleware v. Admiral Corp., 442 F.2d 56 (7th Cir. 1971).

The filed rate doctrine was enacted to correct the evil of discriminatory transportation practices. The Interstate Commerce Act "embodied a wide reaching and sweeping scheme to prohibit unjust discrimination in the rendition of like services under similar circumstance and conditons, and to prevent undue or unreasonable advantages to those involved in the business of interstate commerce." 1 Collier on Bankruptcy (15th ed.) 5.37 at 5-158. It is believed, and therefore alleged, that Campbell's conduct during the course of the moving operations has been with a design to take advantage of a situation with which it became confronted, at the expense of the bankruptcy estate of MBI

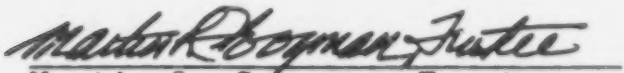
Business Centers, Inc. Campbell's is attempting to wield the sword and shield of the filed rate doctrine, Consolidated Freightways Corp. of Delaware v. Admiral, supra, to obtain compensation pursuant to its filed tariff rate. As held by the district judge, however, "... a move which cost in excess of $100,000 could only be considered detrimental and an expense which was incurred primarily in the interest of [Campbell's]. Appx. to Pet. for Cert. A31.32. (emphasis added); see also, Patch, supra at 745.

For the foregoing reasons, Campbell's is not otherwise entitled to be paid the amount of its filed tariff schedule, and the Writ should be denied.

CONCLUSION

For the reasons stated, the Trustee urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,



Martin L. Goozman, Trustee
9101 Cherry Lane, Suite 207
Laurel, Maryland 20708
(301) 953-7480
Respondent, Pro Se